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No. 498 IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

TRANSIT COMMISSION and WILLIAM G. FULLER, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the TRANSIT COMMISSION,

Appellants,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, and INTERSTATE COMMERCE COMMISSION,

Appellees.

THE STATE OF NEW YORK,

Appellant,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, and INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF ON BEHALF OF APPELLANTS.

GEORGE H. STOVER,
Solicitor for Appellant,
Transit Commission.

JOHN J. BENNETT, JR.,
Solicitor for Appellant,
The State of New York.

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The Hecla Press, 225 Varick St., N. Y. Tel. WAlker 5-1490.

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IN THE

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Appellants,

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THE STATE OF NEW YORK,

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THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, and INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF ON BEHALF OF APPELLANTS.

This appeal has been taken pursuant to Sections 47 and 47-a, Title 28 of the United States Code, to review a final decree of the District Court of the United States for the Southern District of New York, made and entered on October 17, 1931, denying applications for preliminary injunctions and dismissing petitions that an order of the Interstate Commerce Commission made on April 10, 1930, as modified on June 17, 1931, be set aside and annulled.

This order of the Interstate Commerce Commission was a certificate of public convenience and necessity to The Long Island Railroad Company permitting it to abandon 4.1 miles of its Whitestone branch, in the Borough of Queens, City and State of New York, on October 15, 1931. The final order was adopted by the Interstate Commerce Commission by a vote of six to four.

Statement.

The Long Island Railroad Company, a New York corporation, with a road of over 400 route miles and about 1,500 track miles (R. 278), lies entirely within the State of New York and, except for trackage rights into the Pennsylvania Station, Manhattan, entirely on Long Island. A little more than one-fifth of its revenue comes from interstate sources.

Its Whitestone branch, entirely within the Borough of Queens (R. 322), is a single track electrically operated line, 4.7 miles in length, running from its junction with the company's Port Washington branch to Whitestone Landing on Long Island Sound (R. 31). The branch, originally constructed in segments by several small independent companies between 1868 and 1886, was acquired by the Long Island Railroad Company in 1889 (R. 31). It has five stations: Bridge Street (Flushing), College Point, Malba, Whitestone and Whitestone Landing (R. 31). It is operated principally in commuter passenger service between these stations and the Pennsylvania Station in New York City (R. 31).

Near the Bridge Street station in Flushing, the branch crosses Northern Boulevard at grade, creating one of the most dangerous grade crossings in the City of New York (R. 429); and on June 2, 1926, the Transit Commission of the State of New York, after a hearing, ordered the Company to eliminate this and three other crossings in the immediate vicinity (R. 33).

The Company did not appeal to the courts from this order, as it had a right to do (R. 429); but on July 13,

1926, offered to quit-claim to the City of New York the portion of the branch which it now seeks to abandon (R. 33). While this offer was pending before the City authorities, the Transit Commission by successive orders extended to December 31, 1928, the time of the Company within which to notify it whether the elimination order was accepted and would be obeyed (R. 431). On January 10, 1929, after the Transit Commission had refused to extend this time further, the Long Island Railroad Company filed with the Interstate Commerce Commission an application under Section 1 (18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, for a certificate of public convenience and necessity permitting the abandonment of the 4.1 miles of the branch, extending easterly from the west bank of the Flushing River (R. 30).

The Transit Commission and others were permitted to intervene (R. 30); and in July, 1929, hearings were held before an Examiner of the Interstate Commerce Commission.

The Company showed that there were twelve grade crossings on the branch (R. 260) and that, if all were eliminated, the total cost would be about $4,000,000, of which the Company would have to pay about $2,000,000 (R. 44). The interveners showed that the Company could borrow its share from the State at a rate of interest which would be between 4 and 5 per cent. (R. 439). It was also shown that the Company would save the $37,300 now paid for grade crossing protection (R. 45) and the amount of damages paid for grade crossing accidents (R. 304).

The Company showed that the number of passengers carried on the Whitestone branch in each of the following years was as follows (R. 39):

1925	2,435,370
1926	2,461,380
1927	2,260,927
1928	1,583,153
1929 (estimated)	1,113,000

The interveners showed that it was on January 21, 1928, when the City subway opened operation into Flushing (R. 398), which is by far the largest of the five communities served by the Whitestone branch (R. 398). The Main Street station of the subway is more centrally located than the Bridge Street station of the Whitestone branch. The subway service from Flushing is more frequent, and the fare much lower.

The Company sought to show that in 1928 there was a deficit of about $125,000 on the Whitestone branch (R. 142E); but the interveners brought out that the branch expenses for the year were unusually large (R. 294-295) and that large amounts were arrived at by prorating to the branch certain overheads incurred for the system as a whole (R. 296-302).

The evidence showed that the company was very, and increasingly, prosperous, and that the larger proportion of its revenue was derived from intrastate rates. From 1925 to 1928, its passenger operating revenue increased from $24,162,833 to $26,460,389; its freight revenue from $10,603,283 to $11,605,106; its total railway operating revenue from $36,869,291 to $40,532,571; its net revenue from railway operations from $9,897,259 to $12,098,214; its railway operating income from $7,686,929 to $9,390,508; and its net income from $3,840,126 to $4,547,888 * (R. 142D).

The Company had $39,994,106 of stock, practically all owned by the Pennsylvania Railroad Company, and $44,333,100 of bonds. In 1928, after paying operating expenses, taxes and interest on its bonds, it had a net income of $4,547,888 (partly estimated), actually $4,682,656, and declared a 6 per cent. dividend amounting to $2,400,000 (R. 294). Of its total operating revenues in 1928, $26,460,389.75 was passenger, practically all intrastate, and $11,605,106.19 was freight (R. 36). Of the freight, 75 per cent., or $8,703,829.24, was interstate (R. 258, 447, 450).

* This was partly estimated. The actual figures were $4,682,656 (R. 217).

The population in College Point, Malba, Whitestone and Whitestone Landing increased from 15,914 in 1920 to 20,963 in 1925 (R. 136) and has kept on increasing (R. 281), although not so rapidly as other parts of Queens, which has grown very rapidly in the last four or five years (R. 63, 324). At the time of the hearing, a carefully prepared estimate placed it at over 45,000 (R. 610-611).

These four communities lie on the ridge of high land fronting on Long Island Sound, north of a broad marsh, intersected by tidal creeks, which separates them from Flushing (R. 264, 399, 403). A company witness conceded that it was a beautiful section, right on the waterfront, and suited in every way for residential purposes (R. 324-325). They are primarily residential (R. 580); and many of their inhabitants work in Manhattan (R. 32). In 1928, after the City subway had cut heavily into its traffic at Flushing, the largest of the five communities served, the Whitestone branch carried 1,583,153 passengers (R. 39). It is the only railroad serving the four communities on the ridge (R. 270), Flushing being the only community directly served by rapid transit (R. 398).

Under these circumstances, the abandonment of the branch will drive commuters elsewhere and cause land values to depreciate. Sales of real estate have already been lost because of the agitation for abandonment (R. 41). Real estate men from each of the four communities testified that abandonment would cause losses in real estate values in their respective localities as follows: In College Point, on residential property, between 15 and 20 per cent., and on factory property abandoned, 50 per cent. (R. 557); in Malba, a very high class residential place (R. 265), with homes running from $15,000 to $150,000 (R. 595), at least 15 per cent. and up (R. 565); in Whitestone, between 20 to 25 per cent. (R. 515); and in Whitestone Landing, at least 20 to 25 per cent. (R. 554). Ira L. Terry, a prominent real estate man from Flushing, called by the City, thought that these witnesses had testified to a fair percentage in their respective com-

munities (R. 580); but believed that the loss in market value would be 25 per cent. (R. 580). The assessed valuation in College Point was $23,676,280 (R. 559). The Lily-Tulip Cup Corporation, with 414 employees at their College Point plant, would be forced to move it to New Jersey or Westchester (R. 545).

On September 18, 1931, after the hearing had been closed, the Company petitioned the Interstate Commerce Commission for a reopening of the hearing, in order that it might introduce in evidence a statement, a copy of which it submitted, issued by the Board of Transportation of the City of New York to the newspapers, concerning certain proposed extensions to the City's rapid transit system, including one into the Whitestone area. It alleged that this statement showed "that the City of New York definitely plans and intends to construct a rapid transit extension or branch to service Whitestone, College Point and all of the territory now served by the Whitestone branch" (R. 191). This petition to reopen the hearing was not opposed by the Transit Commission, but was denied by the Interstate Commerce Commission (R. 215).

On November 14, 1929, the Examiner filed his proposed report in which he said (R. 27):

> "With traffic steadily decreasing on the Whitestone branch, as shown above, and with the applicant confronted by the necessity of spending some $2,000,000 for grade crossing elimination *plus the probable ultimate extension of the rapid transit system* or the establishment of bus service in the area involved, *thereby rendering the branch useless*, the continued existence of the branch cannot be justified." (Italics ours.)

In that report he recommended that the Commission find that (R. 14):

> "1. The present and future public convenience and necessity permit the abandonment by the Long Island Railroad Company of a portion of its White-

stone branch in Queens County, N. Y., on the condition that necessary truck and bus service be established; or

2. In the event of expression of willingness by the Transit Commission, State of New York, to rescind, or extend indefinitely the effective date of, its order of June 2, 1926, requiring the elimination of grade crossings on said Whitestone branch, the application herein be denied."

Exceptions having been filed to this report, oral argument was held before Division 4 of the Interstate Commerce Commission on January 28, 1930 (R. 29).

The Transit Commission declined to revoke or suspend its elimination order.

Two of the three Commissioners (Meyer and Woodlock) adopted a report (162 I. C. C. 363) which followed *verbatim* most of the report proposed by the Examiner (cf. R. 15-26, R. 30-45). Commissioner Woodlock also filed a concurring statement in which he said that the suggestion that a prosperous carrier may not abandon a non-profitable branch line unless the branch imposes an unreasonable burden upon interstate commerce had been definitely rejected by the Interstate Commerce Commission (R. 48-49).

Commissioner Aitchison dissented. In his opinion he said (R. 51-54):

"There is little about the operation of the branch itself, present or future, of a character to interest the national Government in its function of regulating and protecting commerce between the States. Whether, assuming jurisdiction upon our part, we shall exercise it to permit the applicant to abdicate what but for our authorization is clearly a continuing legal duty voluntarily assumed by it, must be determined with sound discretion. Unless a substantial burden exists against interstate commerce which can be relieved in no other way, we should leave the applicant to respond to the laws of the State which chartered it and the municipality whose franchises it has accepted.

"The situation is essentially local. Like situations exist in many other cities, and are dealt with effectively, intelligently, and with full justice, under local laws. Applicant does not ask us merely to permit withdrawal from interstate business, but, as against the protest of the State and City, and in contravention of its charter, State laws, and municipal franchise our authority is asked to abandon and tear up an urban electric railway line, the overwhelming proportion of whose traffic is local to the city of New York. We should exercise jurisdiction only if the case is free from doubt, when such course is the only way to free interstate commerce from unreasonable burdens, obstructions, or unjust discriminations resulting from operation of the line at a large loss. Continued operation of the branch which will impose only a relatively light burden upon a prosperous carrier is not such a burden. *Colorado* v. *United States,* 271 U. S. 153. As will be pointed out later, the applicant can recoup any losses, under the laws and processes of the State of New York and the guaranties of the Constitution, without our taking the unusual step of setting aside the effect of other provisions of those laws. The authority conferred upon us should be exercised in the light of the continuing purpose of Congress to refrain from any regulation of intrastate commerce save such as is necessary to free interstate commerce from a burden or obstruction which is unreasonable. *Texas* v. *Eastern Texas R. Co.,* 258 U. S. 204. This record discloses no such burden.

* * * * * * *

"Here there is no showing as to the general effect upon the Long Island as a whole. In abandonment cases we have recognized that the carrier's business must be considered as an entirety, and that it cannot claim the right to earn a net profit from every section into which the road might be divided. *Pere Marquette Ry. Co. Abandonment,* 72 I. C. C. 303; *Green Bay & W. R. Co. Application,* 70 I. C. C. 251, and cases cited. And this is merely in harmony with the general rule, that a carrier cannot claim the right to earn a net profit from every mile, section, or other part into which a road might be divided. *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S.

649; *Northern Pac. R. Co.* v. *North Dakota*, 236 U. S. 585. The revenues of the carriers are to be judged as a whole, and not by particular portions or divisions. *Class Rates from Chestnut Ridge Ry. Stations*, 41 I. C. C. 62; *Louisville & N. R. Coal and Coke Rates*, 26 I. C. C. 20; *Stonega Coke & Coal Co.* v. *Louisville & N. R. Co.*, 39 I. C. C. 523. Applicant, with the burden upon it of clearly justifying its extraordinary application to Federal authority to relieve it from the operation of State laws in a peculiarly local situation, has made no attempt to show the aggregate effect of its operations. If the results upon the branch are unreasonably low, the law of the State of New York requires the fixation of reasonable charges and provides adequate administrative machinery to enforce the right. Applicant can compel compliance with the constitutional obligations of the State should it be denied due process or equal protection of laws in respect of the intrastate commerce which yields about 97 per cent. of the revenues under consideration. The whole set of commutation rates of the applicant recently has been reviewed by the State authorities, and found to be adequate. Presumptively the line was considered as a whole, which automatically gave due weight in the composite result to any unfavorable returns from this particular minor portion of the whole system. If the revenues are not sufficient to take care of any shortage upon this branch line, the State, which resists segregation and abandonment, may provide the revenues from the whole system of intrastate fares, and applicant will have no complaint. *United Railways & Electric Co.* v. *West*, 50 Sup. Ct. Rep. 123.

"No such unfavorable showing could be made. The fact is to the contrary. The table showing applicant's income accounts in the report of the majority is incomplete. To interpret it properly the investment or value of the property should be shown; the materials and supplies; the accrued depreciation; the net railway operating income (instead of the railway operating income, which does not take into account the very important item of joint facility rents); the amount of the stocks and bonds, and the return from operation on each of these. However, the table shows a steady increase in net

revenue from railway operations, year by year, for the four years shown, and a general increase in railway operating income. The figure of net income appearing in the table is of little significance. It reflects gross income after payment of interest on funded and unfunded debt, and is the balance available for the stockholders. For the year 1928 the amount available to the stockholders was 13.33 per cent. of the par of the outstanding stock, after payment of all corporate charges, fixed and otherwise."

Upon the Report of the majority of Division 4, an order was entered, April 10, 1930, the material portions of which provided (R. 58):

> *"It is hereby certified,* That the present and future public convenience and necessity permit the abandonment by the Long Island Railroad Company of the portion of its Whitestone Branch in Queens County, N. Y., described in the application and report aforesaid: *Provided, however,* and this certificate is issued on the express condition, that coincident with said abandonment the Long Island Railroad Company, if it may lawfully do so, shall establish adequate bus service at all stations now served on the Whitestone branch with the exception of Bridge Street, Flushing, and establish truck service for less than carload freight at College Point and Whitestone, such bus and truck service to continue in operation until such time as the area served shall have been afforded adequate service by other instrumentalities.
>
> *It is ordered,* That this certificate shall take effect and be in force from and after 30 days from the date hereof."

Although this order was dated April 10, 1930, and was to become effective thirty days from the date thereof, namely, on May 10, 1930, it was not made public until April 22, 1930, and was not received by the Transit Commission until the following day (April 23, 1930).

Upon application of the Transit Commission for a rehearing, dated April 30, 1930, and filed May 1, 1930, the Interstate Commerce Commission granted a rearg-

ment and suspended the effective date of its certificate until further order of the Commission (R. 228).

Oral argument before the full Commission was held on July 10, 1930; and the case was decided on November 3, 1930 (R. 59). The Commission, with four members dissenting, found (166 I. C. C. 671) that "the evidence upon this application, when reviewed in the light of the further argument, substantially confirms the findings of the previous report" (R. 67). It stated that the Company would be expected to submit to the local authorities of the City of New York, within sixty days, its proposal for substitute service (R. 69). Commissioner Lewis filed a concurring opinion (R. 69); and Commissioner Aitchison filed a dissenting opinion. Chairman McManamy and Commissioners Lee and Eastman also dissented (166 I. C. C. 681).

On May 13, 1931, the Company filed with the Interstate Commerce Commission a petition which prayed that it be relieved from the obligation to furnish substitute service by busses and that an effective date of the certificate be fixed (R. 78). It alleged that the local authorities had failed to extend and would not extend the co-operation and aid necessary to enable the petitioner to secure the franchises for bus service, and that it "appears that the Board of Estimate and Apportionment (1) has declared against taking over the Whitestone Branch; (2) has declared its policy to progress speedily the rapid transit extension of its Flushing route; (3) has declared its policy to be to progress speedily the granting of franchises for bus service to corporations other than applicant."

The verified reply of the Transit Commission, filed May 22, 1931, denied these allegations, except as to the taking over the branch by the City (R. 228), and submitted "that there is no evidence upon the record to support the allegations of said petition and that in the absence of such evidence the application should not be granted" (R. 234).

On June 17, 1931, without having held any hearing or taken any evidence on the matters alleged in the petition or on the issues raised by the denial of the petition, the

Interstate Commerce Commission, with four members dissenting and one not participating, adopted a Supplemental Report (175 I. C. C. 163) and an Order which provided (R. 77):

> "*It is ordered,* That the certificate of public convenience and necessity issued to the Long Island Railroad Company in this proceeding under date of April 10, 1930, shall take effect and be in force from and after 120 days from the date hereof."

A suit to set aside and enjoin the certificate was instituted by the filing of a petition by the Transit Commission and its members on July 31, 1931. The Interstate Commerce Commission intervened as a respondent; and all the respondents answered and, except the intervening respondent, filed motions to dismiss.

On September 1, 1931, the State of New York, by its Attorney General, instituted a suit by filing an identical petition. The Interstate Commerce Commission also intervened in this latter suit; and all the respondents answered.

On September 17, 1931, upon application of the Transit Commission and the State of New York, made on September 11, 1931, orders to show cause were made convening a special court of three judges—the Honorable Martin T. Manton, Senior Circuit Judge, the Honorable Francis G. Caffey and the Honorable Alfred C. Coxe, District Judges—and requiring the respondents to show cause before that Court on September 30, 1931, why the order of the Interstate Commerce Commission should not be temporarily enjoined.

At the hearing held on the order to show cause on September 30, 1931, the two suits were consolidated; the record before the Interstate Commerce Commission was introduced in evidence; and all parties rested upon that record and agreed that the Court might proceed to final decree.

On October 15, 1931, the day on which the certificate became effective, the Court handed down an opinion (R. 740) holding that the applications for preliminary injunctions should be denied and that the petitions should be

dismissed. A decree to that effect was made and entered October 17, 1931 (R. 747). It is from that decree that this appeal is taken (R. 755).

On October 22, 1931, an order was signed by Mr. Justice Stone and was entered, staying the certificate pending the hearing and determination of this appeal.

Specification of Assignment of Errors to Be Urged.

The District Court erred:

1. In failing to set aside and annul the order and certificate of the Interstate Commerce Commission, dated April 10, 1930, as modified June 17, 1931, in Finance Docket No. 7353—Application of The Long Island Railroad Company for certificate of public convenience and necessity to abandon part of its Whitestone branch.

2. In failing to issue a permanent injunction enjoining, setting aside, annulling and suspending said order and certificate and enjoining and restraining the enforcement, execution and operation of said order and certificate.

3. In dismissing the petitions of the petitioners and denying their application for an injunction.

4. In holding that the issuance of said order and certificate was within the authority conferred upon the Interstate Commerce Commission by Section 1 (18) of the Interstate Commerce Act.

5. In holding that the Interstate Commerce Commission acted within the authority lawfully conferred upon it by Congress to insure adequate railroad transportation for the country.

6. In failing to hold that said order and certificate of the Interstate Commerce Commission was null and void and in violation of Section 1 (18) of the Interstate Commerce Act.

7. In failing to hold that the findings and conclusions and the reports of the Interstate Commerce Commission upon which the said order and certificate were based were not supported by the evidence, were against the weight of evidence, and were contrary to law.

8. In holding that there is ample to support the order and certificate, within the rule in *Colorado* v. *United States*, 271 U. S. 153.

9. In failing to consider the question of law as to whether the Interstate Commerce Commission may authorize abandonment, in order to avoid the expense of a valid order of the Transit Commission, requiring the elimination of a dangerous grade crossing on the Whitestone branch.

10. In failing to hold, as a matter of law, that the order of the Transit Commission directing the elimination of a dangerous grade crossing on the Whitestone branch does not constitute and is not a burden on interstate commerce.

11. In failing to hold that said order and certificate is an unlawful and unwarranted interference with the sovereign power of the State of New York in the valid exercise of its police power in eliminating grade crossings.

12. In holding that the Company has been directed to eliminate grade crossings on the Whitestone branch, estimated to cost upwards of four million dollars.

13. In holding that the rate of interest at which grade crossing elimination money may be borrowed from the State is fixed at 4½ per cent.

14. In failing to hold that the rate of interest at which grade crossing elimination money may be borrowed from the State may be less than 4½ per cent.

15. In holding that the fact that the entire system is operated at a profit does not warrant the claim of the petitioner that, because of such prosperity, it must maintain a branch which is operated at a loss, where the traffic thereon is progressively lessening.

16. In failing to hold that the evidence shows that the continuance of the Whitestone branch will not prejudice, burden, obstruct or interfere with interstate commerce in any manner and will not lessen the ability of The Long Island Railroad Company to properly serve interstate commerce or prevent it from in anywise performing its Federal duty.

17. In failing to hold that said order and certificate was null and void because the abandonment of service on the Whitestone branch would cause serious loss and injury to the communities affected in a case where no prejudice resulting to interstate commerce is demonstrated.

18. In failing to hold that the evidence before the Interstate Commerce Commission fails to show any demonstrated burden or prejudice to interstate commerce.

19. In failing to hold that the certificate and order of the Interstate Commerce Commission was made without balancing the loss to the community against the effect on interstate commerce.

*30. In holding that to continue operation on the Whitestone branch would burden interstate commerce.

31. In failing to hold that the Interstate Commerce Commission recognized that the continuance of the Whitestone branch would impose no burden upon interstate commerce, within the meaning of *Colorado* v. *United States*, 271 U. S. 153.

32. In failing to hold that the Interstate Commerce Commission made no finding that the continuance of the Whitestone branch would burden interstate commerce.

33. In holding that on the facts shown in the record the freight business on the Whitestone branch is sufficiently large in its interstate character to burden interstate commerce if the alleged losses sustained continue.

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*So in original Assignment of Errors (R. 753).
Numerals "30" to "49," inclusive, should have been "20" to "39," inclusive.

34. In holding that the Interstate Commerce Commission has acted cautiously and prudently.

35. In holding that the Interstate Commerce Commission had acted with due regard for the welfare of the communities immediately affected.

36. In holding that the Interstate Commerce Commission had given full opportunity to all parties in interest to be heard.

37. In failing to hold that the Interstate Commerce Commission, in reaching its determination, considered and was influenced by matters submitted to it by The Long Island Railroad Company, on which no hearing was held or allowed, and that such action deprived petitioners of the rights secured to them by law.

38. In failing to hold that the alleged deficits from the operation of the Whitestone branch in 1927 and 1928 are based upon erroneous and improper apportionments of the Company's operating expenses.

39. In holding that the record shows that in 1929 the operating loss on the branch exceeded $150,000.

40. In holding that estimates were given that the carrier's loss on the Whitestone branch in the future would become progressively worse.

41. In holding that the traffic on the Whitestone branch is progressively lessening.

42. In holding that the Interstate Commerce Commission found that the Whitestone branch would lose in favor of the rapid transit system, because the rate of fare to the Pennsylvania Station on the branch line is greater than the five-cent fare paid on the rapid transit line.

43. In holding that the Interstate Commerce Commission found that bus passenger service and motor truck freight service would adequately meet the requirements of the communities served by the branch.

44. In holding that the establishment of bus and truck service will meet the needs of transportation or the needs of the community.

45. In holding that there was any evidence as to what the charters of the Company and of its predecessors required.

46. In holding that the Interstate Commerce Commission fixed the effective date of the certificate of abandonment as of June 17, 1931.

47. In exceeding its authority and province in making the following finding:

> "In this instance, the Commission's suggestion that a bus service be provided for, together with motor truck freight service to take the place of railroad transportation, meets with our approval. If the local authorities will grant the necessary franchises, the offer of the railroad company to meet the needs of the community should be accepted."

48. In failing to hold that the evidence shows that the Company's intrastate traffic from the operation of all its lines, including the Whitestone branch, has been and is especially profitable and in no wise imposes a burden on interstate traffic.

49. In refusing to grant a stay of the enforcement, execution and operation of said order and certificate of the Interstate Commerce Commission pending the determination of the appeal from the order denying the motions for preliminary injunctions and decree dismissing the bills, entered herein October 17, 1931.

Summary of Statement and Points.

The Long Island Railroad Company, an increasingly prosperous road entirely within the State of New York, chiefly engaged in intrastate passenger traffic, with only about one-fifth of its revenue derived from interstate sources (freight), and a net income, in 1928, of $4,682,656, and required by the law of the State to operate its lines *in toto* or to abandon *in toto*, desired to abandon its Whitestone branch, in order to avoid the expense of eliminating a group of *four* grade crossings, one of which is among the most dangerous in the City of New York.

On the claim that, if all *twelve* grade crossings were eliminated, the cost thereof, added to an alleged deficit and a declining traffic, on the branch, would interfere with interstate commerce, it applied to the Interstate Commerce Commission, under Section 1, paragraph (18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, for permission to abandon this branch.

On April 10, 1930, the Interstate Commerce Commission, by Division 4, with *one* of the three members dissenting, issued its certificate, to be effective in thirty days, permitting the Long Island to abandon its Whitestone branch. Later the effective date of the certificate was suspended, subject to further order; and a reargument was held.

After reargument the Commission, with *four* members dissenting, affirmed the certificate but left the effective date suspended.

On June 17, 1931, the Commission, with *four* members dissenting and one not participating, fixed the effective date of the certificate for October 15, 1931.

This case is distinguished from the usual run of abandonment cases by the following circumstances:

1. The Company is unique among interstate carriers, not only as to its present prosperity, but also in that the

overwhelming portion of its revenue comes from passenger, rather than from freight, traffic. Of its total railway operating revenues in 1928, namely, $40,532,572, passenger traffic accounted for $26,460,390, practically all intrastate, and freight traffic for $11,605,106. In 1930, passenger traffic accounted for $27,070,147 and freight traffic for $10,487,666, or more than two and a half times as much as its freight revenues, while for Class I Railroads of the country as a whole it is freight traffic that provides more than five and one-half times as much revenue as does passenger traffic (44th Annual Report of the I. C. C., Dec. 1, 1930, p. 53). While freight declines, owing to truck facilities, commuter traffic increases with the growth of urban and suburban New York. Its interstate freight traffic is not remunerative (*Eastern Class Rate Case*, 164 I. C. C. 314, 441), and is, in fact, carried by the local passenger traffic. Its prosperity is due to intrastate and intracity traffic. Without the local traffic, the railroad would either require higher rates on its interstate commerce or would suffer heavy losses.

2. Since the great preponderance of the Company's revenue comes from intrastate passenger traffic, it follows that, even if it should be found that the total revenues are not sufficient to take care of any possible shortage due to branch operation, the situation could be corrected by increasing the intrastate passenger rates, without touching interstate freight rates at all, and certainly without resorting to the heroic remedy of abandonment.

3. In this case, the Interstate Commerce Commission authorized abandonment, not to stop the drain of operating losses which could be checked in no other way, but to avoid the added capital charges which would be incurred by complying with a grade crossing elimination order, the propriety and validity of which is unquestioned (Point II).

We contend (Point I) that the proposition that the Interstate Commerce Commission may permit the abandonment of a branch in order to enable the carrier to avoid

compliance with a valid order requiring the elimination of a dangerous grade crossing is in direct conflict with the principles enunciated by this Court in *Erie Railroad Co.* v. *Public Utility Commissioners*, 254 U. S. 394, and in *Lehigh Valley Railroad Co.* v. *Commissioners*, 278 U. S. 24, to the effect that, where it appears that the danger is probable and that the method of elimination is not unreasonable, a railroad cannot prevent the exercise of the police power to this end, by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad.

We also contend (Point III) that the action of the Interstate Commerce Commission in this case violated the principles laid down by this Court in *Colorado* v. *United States*, 271 U. S. 153, to the effect that the certificate of abandonment issues only to remove some *demonstrated* prejudice to *interstate commerce* and to free it from *undue* or *unreasonable* burdens and that the determination of the Commission must be arrived at by balancing the *demonstrated* prejudice to interstate commerce against the injury to the community. We contend that these principles were ignored; and shall show that, taking the alleged losses at the maximum claimed, the continuance of operation will impose *no* burden *on interstate commerce*, unreasonable or otherwise (Point IV), while the abandonment would cause the most serious injury to the communities affected (Point VI).

We shall show (Point V) that the majority of the Interstate Commerce Commission made, and could have made, no finding that there was any burden in fact upon interstate commerce, but acted upon the erroneous theory of law that, under Section 1 (18) of the Interstate Commerce Act, the Commission was empowered to review collaterally a grade crossing elimination order and to permit abandonment when, in its opinion, the cost of elimination would be so great, in the light of all the circumstances, as to impose an unnecessary burden on the transportation system of the country, by adding to the amount of their valuation.

We shall show (Points VIII and IX) that among the circumstances, in the light of which this determination was reached, was the erroneous belief that the City of New York would extend its own rapid transit line into the area, thus rendering the Whitestone branch practically useless; and shall show that this belief was derived by considering misleading matter submitted by the Company *ex parte*, on which petitioners were denied the right of a hearing.

For both reasons—the violation of law and the lack of evidence—the certificate should be set aside.

POINTS.

I.

The State has a constitutional right to require the elimination of dangerous grade crossings, regardless of the effect on interstate commerce; and the Interstate Commerce Commission cannot destroy or impair this right or prevent or hamper its exercise, by authorising abandonment of the line, because a valid elimination order has been made.

One of the circumstances distinguishing this case from the usual run of abandonment cases is that here the Interstate Commerce Commission has claimed the right to authorize and has authorized a prosperous carrier to abandon one of its branches, in order to enable it to avoid the expense of complying with a State order (admitted by the Commission to be valid and unassailable in the courts) which requires the elimination of a dangerous grade crossing on that branch.

An issue of the utmost importance is presented when such a claim is set up in opposition to the principle, clearly and firmly established by this Court, that the State, from which the railroad ultimately derives its right to use the land in the streets, has a constitutional right to insist that

they shall not be made dangerous to the public, whatever the cost to those causing the danger.

The case of *Erie Railroad Co.* v. *Public Utility Commissioners*, 254 U. S. 394 (1920), involved a grade crossing elimination order; and came to this Court on writ of error from New Jersey. The order, which required the elimination of fifteen grade crossings, was attacked as interfering with interstate commerce and as violating the Fourteenth Amendment. The laws of New Jersey imposed the entire cost on the railroads, except that in cases where street railways crossed the tracks the street railway paid 10 per cent. of the cost.* This Court affirmed the judgment of the New Jersey Court of Errors and Appeals, which sustained the order. Mr. Justice Holmes said (pp. 410-411):

> "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, *the State*, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, *has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.* That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads, to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down when-

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*The law of New York (N. Y. Laws of 1928, Chap. 677, Sec. 3, as amended by Laws of 1930, Chap. 341) imposes only half the cost on the railroad.

ever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U. S. 241, 246. To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. *Denver & Rio Grande R. R. Co.* v. *Denver*, 250 U. S. 241, 244; *Union Dry Goods Co.* v. *Georgia Public Service Co.*, 248 U. S. 372; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583; *Manigault* v. *Springs*, 199 U. S. 473, 480. If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396. Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty." (Italics ours.)

He added (p. 412):

"If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The Board must be supposed to have known the locality and to have had an advantage similar to that of a Judge who sees and hears the witnesses. The Courts of the State have confirmed its judgment. The tribunals were not bound to await a

collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand. We cannot say that they were not. At some crossings the danger was less than at others, but it was necessary or at least prudent to proceed on a general plan. Upon the whole matter while it is difficult to avoid the apprehension that the state officials hardly gave due weight to the situation of the company as a whole in their anxiety for the well-being of the State, we are of opinion that they did not exceed their constitutional powers. The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil. Probably the conclusion that we have reached could be supported upon the narrower ground that a continuing obligation was imposed by the charters of the plaintiff in error's lessors, and was assumed by the plaintiff in error, but that which we have stated seems to us free from doubt."

This case arose prior to the enactment of the Transportation Act of 1920.

In *Railroad Commission* v. *Southern Pac. Co.*, 264 U. S. 331 (1923), the Railroad Commission of California had, in 1921, made an order requiring three railroad companies to remove certain grade crossings and to build a union terminal station in Los Angeles involving capital expenditures of from $25,000,000 to $45,000,000. The State Supreme Court held that the order was beyond the power of the State Commission, because the subject-matter was committed to the Interstate Commerce Commission by the Transportation Act of 1920. It also held that, if the order had effected the elimination of grade crossings alone, it would have been valid, but that, associated as it was with the Union Station, it must be annulled. This Court brought up the cases on certiorari and affirmed the judgment of the Supreme Court of California.

Referring to the action of the State Supreme Court in rejecting the argument of the Railroad Commission that, in view of its finding that the Union Station was an indispensable element in getting rid of the grade crossings, it had the incidental right to order its building, Chief Justice Taft said (p. 341):

> "The State Supreme Court thus modifies the findings of the Railroad Commission in so far as they sought to tie the validity of its order establishing a union station to its unquestioned police power to regulate grade crossings in the interest of the public safety. We avoid any inquiry how far, if at all, the principle laid down in *Erie R. R.* v. *Board of Public Utility Commrs.*, 254 U. S. 394, is qualified by the provisions of the Transportation Act. Our only question here is whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920."

Lehigh Valley Railroad Co. v. *Commissioners*, 278 U. S. 24 (1928), came to this Court on appeals from decrees of a three-judge District Court in New Jersey, denying a temporary injunction and dismissing the bill on final hearing, in a suit by the railroad company to enjoin enforcement of a grade crossing order. The order was challenged on the grounds that it violated the Transportation Act and the Fourteenth Amendment. It was contended that the method of elimination selected imposed an unnecessarily large expense on the carrier. The cost of the method selected ($324,000) was due in part to the desirability of preserving a straight road. The danger could have been removed at a cost $100,000 less. This Court sustained the judgment and affirmed the order.

As we read this case, this Court did not reverse or modify anything in the *Erie* case. It merely supplemented it, by adding a proviso to cover a situation not raised in the *Erie* opinion, namely, a case where the expenditures were greater than were required to remove the danger. We assume that the opinion must be read in

the light of the fact that the Court was dealing with a case where the actual danger could have been removed at a cost less than that imposed by the method selected.

This Court expressly reaffirmed the principle of the *Erie* case when it said (p. 34):

> "This Court has said that where railroad companies occupy lands in the State for use in commerce, the State has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad cannot prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. *Erie R. R.* v. *Board*, 254 U. S. 394."

Then followed the proviso (p. 34):

> "This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements, and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end."

As we understand it, this Court does not say that expenditures which are reasonably necessary to remove the danger are unreasonable because they are great. It makes it clear "that where reasonable safety requires abolition of grade crossings, the railroad cannot prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad." What it condemns is "great expenditures *unreasonably* burdening the railroad, *when less expenditure can reasonably accomplish the object of the improvements and avoid the danger.*" That is, it may inquire into the danger of the crossing and into the method selected for its elimination, but when it

appears that the danger is probable and the method of elimination not unreasonable, it will not interfere with the order, let the cost or the effect on the company be what it may.

In the instant case, the crossing was dangerous—one of the most dangerous in the City (R. 429)—and the method selected was reasonable. This has never been questioned. The company did not appeal to the courts (R. 429) The report of Division 4 said (R. 47) that "No question of the rights and powers of the State or of the Transit Commission in this respect has ever been raised by any party to the proceeding"; and the concurring opinion of Commissioner Woodlock said (R. 49) that "There is no question here as to the police power of the State or the validity of the grade separation orders."

The elimination order cannot now be attacked collaterally, either by the Company or by the Interstate Commerce Commission, whose characterization of it as an "unnecessary burden upon the transportation system of the country" (R. 67) is based upon an argument which seeks to convey the impression that there is no real danger, by commenting on the number of trains that use it and the fact that nobody, so far as they knew, had been killed in the four years since the order was made (R. 64-65).

It cannot be questioned that, had our order been brought here on appeal, this Court would unhesitatingly have affirmed it. This Court has recognized that the right of the railroad to operate at all across the public highways had to be acquired from the State and acquired subject to the implied limitation or condition that it might be cut down whenever and so far as the safety of the public requires; and that this constitutional right of the State to protect human lives against such dangers takes precedence even over engagements in interstate commerce. How, then, can a mere administrative body emasculate this sovereign power and hinder its exercise, on the plea that it would interfere with interstate commerce? How can it ignore a fundamental constitutional principle supported by this Court?

The Interstate Commerce Commission has not expounded its theory; but, very likely, if formulated, it would run something like this: We recognize the validity of the order and give it full lip service; we do not purport to set it aside, expressly, but leave it in full force; we merely prevent its enforcement, by destroying the branch to which it applies; we do not destroy the order itself, but merely the road and the obligation of the carrier's charter to take the lean with the fat; the order is left untouched, although the branch is destroyed; its enforcement is not enjoined, but is merely made impossible.

Bearing in mind that the thing in jeopardy is not the right of the State to issue orders, but its right to protect human lives, all such argumentation seems to us to be mere logomachy. In view of the practice of this Court to look at substance rather than form, we submit that the constitutional right of the State to protect human lives, which this Court has so firmly upheld, would be a nullity or a poor, weak thing, if it could be exercised only subject to the possibility of having the service utterly destroyed at the caprice of an administrative body whose discretion is not subject to judicial review. The right of the State to protect human lives would thus be reduced to the barren privilege of *attempting* to do so, subject to the possibility of losing the road entirely, if the attempt were made. This mere choice of permitting the danger to continue or risking the loss of the road itself cannot be called a sovereign right to protect human lives. Confined to such alternatives, the State might well hesitate. Dangerous crossings on outlying branches throughout the City, the State, and the Nation, would tend to be perpetuated through fear that attempts at elimination might bring about abandonment. The uncertainties and perils of such a system could not but act as a serious deterrent to the process of removing these dangers to public safety, which have so alarmingly increased with the growth of automobile traffic.

To say that this constitutional right of the State need not give way to the claims of interstate commerce, when

elimination orders come directly before the highest Court in the land, but that it must give way when these orders come before the Interstate Commerce Commission collaterally, would be to keep the word of promise to our ear and break it to our hope. As a practical matter, no elimination order would ever come directly before the Courts, in a case like this, since all carriers would desert the Courts for the Commission, as the Company did in this case.

It is difficult, from the general language of the sections under which the Interstate Commerce Commission acts (see text in Appendix, pp. 91-93), to discover any intent on the part of Congress to make such a radical innovation in established principles of such supreme constitutional and practical importance—to place dollars above human lives and to make the little finger of interstate commerce thicker than the loins of State sovereignty. The hearing and the debates which preceded the enactment of the Transportation Act indicate that the purpose of Congress was not so much to experiment as to the extent to which Federal supremacy could be pushed as it was to meet certain practical conditions.

Congress is presumed to have legislated in the light of its knowledge that the power to regulate interstate commerce must be exercised in subordination to the right of the States to guard against grade crossing dangers. It is, therefore, unlikely that it intended to legislate in conflict with that principle. Certainly, it ought not to be assumed that it did so, in the absence of some express or, at least, clear indication of such intent.

In *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 391, it was said:

> "Such an intention to override existing state authority to deal with local exigencies is not to be imputed to the Congress unless its enactment compels that conclusion."

See also:

Missouri, Kansas & Texas Ry. Co. v. *Harris*, 234 U. S. 412, 418-419.

Missouri Pacific R. Co. v. *Norwood*, 283 U. S. 249, 256.

The Interstate Commerce Commission itself, when contending that it was without power to assume the constructive but onerous responsibility for the establishment of a new union station, recognized and urged "the settled rule that federal legislation trenching on state authority must be strictly construed" (*I. C. C.* v. *Los Angeles*, 280 U. S. 52, 53).

The power of Congress is not limited to interstate commerce *on railroads;* it extends to interstate commerce *on highways* (*Buck* v. *Kuykendall*, 267 U. S. 307; *Bush Co.* v. *Maloy*, 267 U. S. 317). Presumably, it has some interest in the safety of those using the highways in interstate commerce. One matter, beside the establishment of union stations, which it has certainly not delegated to the Interstate Commerce Commission, is the elimination of grade crossings. It may be argued, therefore, that it did not intend to destroy a useful power for which it provided no substitute.

Assuming that this Court will make no distinction between certificates of abandonment and the exercise of other powers of the Interstate Commerce Commission, it appears that Congress has confined the function of the Courts to a consideration of the question as to whether the Commission acted within its power (*Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547). Assuming further that the right of a State to protect the lives of the public is, at least, of equal dignity with the property right of a private corporation, it would appear that an attempt to authorize the Interstate Commerce Commission to deprive the State of that right, without providing for a judicial review on both the law and the facts, would constitute a denial of due process of law (*Ohio*

Valley Co. v. *Ben Avon Borough,* 253 U. S. 287). We submit that any such attempt to deprive a State, in such manner, of a right, without which it could hardly function, would raise a grave constitutional question. It is the settled practice of this Court that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score" (*United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *Missouri Pac. R. R.* v. *Boone,* 270 U. S. 466, 471-472).

In *Colorado* v. *United States,* 271 U. S. 153, this grade crossing issue was not presented. There, the operation of the line was not required by local conditions (271 U. S. 160), but did impose a burden on interstate commerce, which could be removed in no other way.* Here, the branch operation was required by local conditions (Point VI) and did not impose any burden on interstate commerce (Point IV), and the Commission did not authorize abandonment because of the branch deficit, which could have been corrected by increasing the intrastate rates. It held, in fact, that this deficit alone did not justify abandonment (Point II). Here, the abandonment was permitted, because, upon this deficit, there would be imposed the cost of the grade crossing elimination. That was a determining factor.

An obvious purpose of the abandonment section was to prevent the severance and disruption of interstate lines. Judicial authority, however, compels us to recognize another purpose, namely, getting rid of weak lines which unreasonably burden interstate commerce. The limitations on this power have been partially but not completely marked out. The facts in the *Colorado* case are consistent with the theory that abandonment was intended as a special method for relieving undue burdens on interstate com-

* In the *Colorado* case the traffic was so slight that public convenience and necessity did not require continuance of the branch and that the losses could be offset only by increasing the interstate rates on other parts of the road (*Abandonment of Branch Line by C. & S. Ry.,* 82 I. C. C. 310, 311; 86 I. C. C. 393, 395).

merce, which cannot be corrected in any of the other ways provided in the Transportation Act of 1920. There are circumstances which tend to indicate that it was the intention of Congress to confine it to that.

It should never be entirely forgotten that the existence and practically all the rights of the carriers were derived from the States; and that these rights in New York, at least, were granted on certain conditions, among which was the condition that the roads would operate *in toto* or abandon *in toto*. (*People* v. *Albany & Vermont R. R. Co.*, 24 N. Y. 261, 269; *Paige* v. *Schenectady R. Co.*, 178 N. Y. 102, 114). This condition was dictated by the desire of the State to secure service through private enterprise for as many localities as possible, and by the knowledge that more sparsely settled localities could not be served at all, except by carriers which linked strong and weak franchises together. When, therefore, a carrier is permitted to defeat this policy, by ignoring the conditions which accompanied the grant and retaining the strong lines, no other carrier can possibly take up the weak lines alone and the State or the municipality may, and in this case probably will, be forced to build lines at their own cost, in order to take care of these neglected areas.

We mention this, not so much to question the *power* of Congress, as to suggest the possibility that it took a reasonable view of the matter and did not intend to destroy these contract rights, except in cases where relief to interstate commerce from undue burdens could not be effected by the other means provided in the Transportation Act.

The *Colorado* case, we submit, does not hold to the contrary. In that case, it was found that the company "was chartered to engage in both intrastate and interstate commerce" (271 U. S. 153, 164); that "the obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its Federal duty, also assumed, efficiently to render transportation service in interstate commerce"; and that "there is no con-

tention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss" (271 U. S. 153, 165). That is, the State, by chartering the company to engage in interstate commerce made its contract with the company subject to Federal regulation in the interest of interstate commerce. The opinion of the lower Court in the instant case failed to notice that in the *Colorado* case the company was chartered to engage in both intrastate and interstate commerce, but quoted the conclusion which this Court drew from that fact, and then added: "This railroad did not undertake by its charter to continue to operate this branch regardless of the cost" (R. 746).

The charter of the Company was not in evidence; but the lower Court had before it the decisions showing that, by the law of New York, there is implied in every railroad charter the obligation to operate *in toto* or to abandon *in toto*. Moreover, there was no proof as to what the charters of the predecessor companies provided, for they were not in evidence either. The branch was constructed in segments by several small independent companies (R. 31, 132-133). From their location, it would seem that they could not have been engaged in interstate commerce; and there is nothing to show that originally they connected with any interstate carrier. The probability is that they were not chartered to, and did not, engage in interstate commerce. If they were not, they differed from the company in the *Colorado* case. It seems fair to insist that, if the Company, the Commission or the Courts intend to justify the disruption of the charter contract with the State, on the ground that they were chartered to engage in interstate commerce, a chain of evidence should be forged strong enough to sustain the claim.

But be the case what it may in regard to contract rights, the situation is entirely different in the case of the police power, especially where it is exercised not in regard to public convenience, health or even morals, but in regard to life itself. That right certainly cannot be waived or con-

tracted away; and so we submit that, where the determining factor in an abandonment certificate is the existence of a valid grade crossing elimination order, that certificate is void. Elimination orders should be reviewed by no lower authority than the Courts, and by them directly. Certainly, they should never be reviewed collaterally by a mere administrative body. When the Courts have passed upon such orders, that should be final. If the Court sets aside such order, there is no need, and, if it sustains it, there is no right, for the Interstate Commerce Commission to overhaul it collaterally in an abandonment proceeding.

In the *Lehigh Valley* case, an elaborate argument was made to impeach the validity of the elimination order because of the amendment to the Interstate Commerce Act, contained in the Transportation Act of 1920. In connection with this, Chief Justice Taft said (278 U. S. 24, 35) that "it is not necessary for us to controvert the proposition that unreasonably extravagant grade crossings are to be enjoined not only as violations of the Fourteenth Amendment but also as forbidden by the Transportation Act." He added that "if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, *this should be made clear,*" and that "it was certainly not intended by the Transportation Act to take from the States, or to thrust *upon the Interstate Commerce Commission,* investigation into parochial matters like this, unless, by reason of their effect on economical management and service, their general bearing *is clear.*" He did not say that the Interstate Commerce Commission may investigate into such matters when their general bearing is clear; but he did say that certainly it might not do so *unless* their bearing *is* clear.

We shall show (Point IV) that, taking all the expenses together, their bearing on interstate commerce is not clear —that their effect on interstate commerce is, in fact, undemonstrated in amount and tenuous in character; and that (Point II) the chief factor which determined the Interstate Commerce Commission to permit abandonment

was its disapproval of the grade crossing elimination order made by the Transit Commission.

We, therefore, respectfully submit that the certificate is invalid and should be set aside, because it was issued on grounds upon which the Interstate Commerce Commission was not authorized to rely or to act.

II.

The Interstate Commerce Commission authorized the abandonment of the Whitestone branch because of the State order, and possible future orders, requiring the elimination of grade crossings thereon.

The Vice-President of the Company testified that the reason for the railroad initiating this case was to avoid what it thought was a wasteful use of its funds in eliminating the grade crossings (R. 259), and that the real reason for the application was that the Company wished to avoid what it called a useless expenditure of money for the grade crossings (R. 268).

The Report of the Commission on Reargument said (R. 64):

> "The offer to the city was made by the applicant immediately following the issuance of the order of the Transit Commission in the summer of 1926, and the present application was filed as the result of the refusal of the Transit Commission to further extend the effective date of its order. It is clear, therefore, that the order of the Transit Commission was the main reason for the filing of the application."

That the elimination order was the reason for the abandonment order is shown by the Examiner's recommendation that, with the elimination order in force, the application should be *granted,* but, "in the event of expression of willingness by the Transit Commission, State of New

York, to rescind, or extend indefinitely the effective date of, its order of June 2, 1926, requiring the elimination of grade crossings on said Whitestone branch," that the application should be *denied* (R. 14, 45).

As the suggestion was not accepted, the majority of Division 4 contented itself with saying that "in view of the attitude of the Transit Commission toward the suggestion of the examiner further discussion of the matter is unnecessary" (R. 47). Since the threat to abandon produced no result the only thing left to do was to carry it out.

The Report on Reargument said (R. 67):

> "Considering all the circumstances, we are convinced that an expenditure by the applicant of about $2,000,000 in the elimination of the grade crossings on its Whitestone branch would be an unwarranted expenditure, if the transportation needs of the public now served by the line can be reasonably cared for otherwise."

Commissioner Aitchison recognized that the grade separation seemed "to be the whole sticking point" (R. 70).

All this and everything else in the record (see R. 69) shows that the certificate was granted because the Interstate Commerce Commission deemed the expenditures imposed upon the company by the proposed grade crossing elimination a capital charge creating an "unnecessary burden upon the transportation system of the country," "an unwarranted expenditure" (R. 67).

III.

The Interstate Commerce Commission is without power to authorize abandonment, except in a case where such course is necessary to protect interstate commerce from undue or unreasonable burdens; and must arrive at its determination by balancing the demonstrated prejudice to interstate commerce against the injury to the community; and can authorize abandonment only where such prejudice outweighs the injury to the community.

Such jurisdiction and power over abandonment as the Interstate Commerce Commission has is derived from the concluding portion of Section 1, paragraph (18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, namely,

> "and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." *

As "public convenience and necessity" is not usually promoted by depriving the public of transit facilities, the provision that no railroad line could be abandoned *unless and until* the Interstate Commerce Commission issued its certificate that public convenience and necessity permit of such abandonment might suggest, especially in view of the absence of any express authority to destroy local facilities or abrogate State laws, that it was the intent of Congress to *prevent* the possible destruction of interstate facilities, by requiring, in addition to the consent of the State, the consent also of the Federal Government, before an interstate railroad could abandon any of the rights it had received from the State; but such is not the case.

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*For full text, see Appendix, page 91.

This Court, instead of taking the view that the provision was designed merely to *prevent* abandonments which a State might have authorized, held that the Interstate Commerce Commission may also *permit* abandonments which the State has not authorized and desires to prevent.

As the convenience and necessities of the public cannot be advanced merely by depriving it of transit facilities, the nature of the public convenience and necessity must be sought in another direction. As construed by this Court, "public convenience and necessity" is served by lopping off some withered limb which saps the vitality of the whole to such extent as to impair the capacity of the carrier to perform its interstate duties.

An unrestricted power lodged in an administrative body, to abandon local facilities whenever in its mere opinion there might possibly be some advantage to interstate commerce in doing so, would ultimately result in serious abuses. Such delegation of power is probably beyond the power of Congress to make. At the very least, it is contrary to legal presumptions as to the delegation of legislative power.

In *Wichita R. R.* v. *Public Util. Comm.*, 260 U. S. 48, 59, Chief Justice Taft, speaking of a State Commission similar to the Interstate Commerce Commission, said:

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

Accordingly, this Court, which found in the statute the power to permit abandonments over the protest of the States, also found in it a certain course of procedure and certain rules of decision which must be followed by the Interstate Commerce Commission in the performance of

its function; and these, if observed, will prevent to a large extent the abuses which might otherwise be incident to an arbitrary power exercised in a perfunctory or bureaucratic spirit.

Colorado v. *United States*, 271 U. S. 153 (1925), was an abandonment case. This Court, after having reviewed the evidence, sustained the certificate. Mr. Justice Brandeis said (pp. 162-163), the italics being ours:

> "*The certificate issues*, not primarily to protect the railroad, but *to protect interstate commerce* from *undue* burdens or discrimination. The Commission by its order removes an obstruction which would otherwise *prevent the railroad from performing its federal duty.* Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, *thereby lessening the ability of the carrier properly to serve interstate commerce.* Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.
>
> *The sole objective of paragraphs 18-20 is the regulation of interstate commerce.* Control is exerted over intrastate commerce *only* because such control is a necessary incident of freeing *interstate commerce* from the *unreasonable* burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as *to prejudice* interstate commerce."

And at page 164:

> "The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent *unjust* preference to particular intrastate shippers or localities at the *demonstrated* expense of interstate commerce."

And at page 166:

> "It (Congress) may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be *adequately* rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon *the facts* of the particular case. The authority to find *the facts* and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission. * * *"

And at pages 167-169:

> "While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a *finding* that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, *the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both.* (Citing cases.) The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. * * *

"It is rare that the application for leave to abandon actually involves a conflict between the needs of interstate and of intrastate commerce. In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. *In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.* The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made *upon a balancing of the respective interests*—the effort being to decide what fairness to all concerned demands. In that *balancing*, the fact of *demonstrated* prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a *specific finding* to that effect.

"An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was ample evidence to support *the facts found*, and that the judgment of the Commission was not improperly influenced by the offer to lease the line to the protestants at a nominal rental."

These excerpts show the rationale of the enactment, the occasions when the power may be, and the conditions under which it must be, exercised. They define and limit the extent of the power itself. It is, of course, less broad than that of Congress itself.

They show that the sole objective of the provision is the regulation of interstate commerce; and that what the

certificate issues in order to protect is interstate commerce, and not the railroad company itself. Abandonment is not (as is the protection afforded by the Fourteenth Amendment) granted to relieve the railroad company from loss or expense. It is granted only to remove some prejudice to interstate commerce—to free interstate commerce from some burden, obstruction or discrimination.

Not every degree of prejudice, burden, obstruction, or discrimination will justify abandonment. The prejudice must be demonstrated. The burdens or obstructions must be undue and unreasonable. The discrimination must be unjust. Abandonment is a drastic remedy. Once it becomes effective, the State's transit facility and the company's contract obligation to furnish service are gone forever. Such amputations are not performed for light or transitory disorders, but only to check financial gangrene threatening the vitals of interstate commerce.

The Interstate Commerce Commission determines whether abandonment is consistent with "public convenience and necessity"; but in reaching its determination it must have regard to the needs of both intrastate and interstate commerce; for the purpose of the Transportation Act of 1920 was to maintain adequate service for both. This determination must be made upon a *balancing* of the respective interests, in order to see what fairness to all concerned demands and to reveal whether the demonstrated prejudice to interstate commerce outweighs the serious injury to the community.

From any viewpoint, public convenience and necessity is not advanced by the mere destruction of branch facilities. It is advanced only where the abandonment will remove some undue or unreasonable burden on interstate commerce. Until such effect is demonstrated, it cannot be said that public convenience and necessity requires or permits the abandonment. Indeed, in the absence of some actual benefit to interstate commerce, an abandonment which would result in serious injury to the community

and destroy the adequate intrastate service, which it is one aim of Congress to maintain, would be absolutely inconsistent with public convenience and necessity. The effect on interstate commerce must be ascertained before there can arise any necessity for, or possibility of, balancing it against the serious injury to the community.

As the power of the Commission over abandonment is derived solely from the power of Congress over interstate commerce, there must be demonstrated prejudice to interstate commerce, in order to furnish a constitutional basis for action by an administrative body. Prejudice to interstate commerce must be *demonstrated*. It cannot be inferred from the mere fact that there may be a loss to the company. One must be able to see from the evidence that the carrier's loss reacts upon interstate commerce in some actual, measurable, appreciable way and not merely in some infinitesimal or speculative degree.

Accordingly, local facilities are not to be destroyed unless and until it can be shown that the loss to the carrier lessens, not its net income, but its ability to serve *interstate commerce*, or compels it to raise reasonable *interstate* rates or to abstain from reducing such rates, or to forego facilities needed in *interstate commerce*, or so weakens its financial condition as to raise the cost of securing capital and thus compel an increase of rates.

While the Interstate Commerce Commission may dispense with *findings*, it may not dispense with *facts*, if its certificate is to be sustained; for the courts must review the evidence to see whether there is evidence to support a finding of an unreasonable burden on interstate commerce, which outweighs the injury to the community.

We shall show hereafter (Point IV) that, in this instance, the continuance of the branch imposes and will impose no demonstrated burden on interstate commerce, unreasonable or otherwise, while (Point V) the abandonment will impose the most serious injury upon the four communities principally affected.

IV.

The evidence shows that the continuance of the Whitestone branch will not prejudice, burden, obstruct or interfere with interstate commerce in any way, and will not lessen the ability of the Company properly to serve interstate commerce or prevent it from performing its Federal duty.

The Long Island Railroad Company is a New York corporation. Its road lies entirely within the State of New York. It carries freight, a large part of which is interstate, but its principal business is that of an intrastate passenger carrier.

Of its total railway operating revenues for 1928, namely, $40,532,571, the sum of $26,460,389 was passenger, practically all intrastate, and the sum of $11,605,106 was freight, of which about 75 per cent., or $8,703,829, was interstate. That is, only a little more than one-fifth of its revenue comes from interstate commerce. It is to aid this that the drastic measure of abandonment is ostensibly invoked.

The Interstate Commerce Commission admits that "the evidence is to the effect that the applicant is a prosperous carrier" (R. 66); but refrains from indicating how very prosperous it is.

The Company has $39,994,106 of stock and $44,333,100 of bonds (R. 708). The valuation of its road is not in evidence (R. 53). In 1928, after paying operating expenses, taxes and interest, it had a net income of $4,547,888 (partly estimated), actually $4,682,656, and declared a 6 per cent. dividend amounting to $2,400,000.

From Exhibit E of the Company's return to the questionnaire (R. 142D), it appears that from 1925 to 1927 its railway operating revenues, its net revenue from railway operations, its railway operating income and its gross income had all increased. Its net income increased from $3,840,126 in 1925 to $4,547,888 (partly estimated) in

1928. The figures for 1928 were partly estimated; and, in its petition for a rehearing (1930), the Transit Commission called the attention of the Interstate Commerce Commission to the fact that the actual net income for 1928 was actually $4,682,656, instead of $4,547,888, that the net income for 1929 (partly estimated) was $6,322,943, and that its corporate surplus advanced from $9,705,635 in 1928 to $12,727,759 (partly estimated) in 1929, after payment of a 6 per cent. dividend on its common stock (R. 217). All of which shows not only that the Company is very prosperous, but also that its business and prosperity are increasing.

The interveners contended that the expenses assigned to the branch in order to show a loss are excessive and were arrived at by an improper method and upon an improper theory; and the dissenting Commissioners agreed with us (R. 54, 57). At this point, however, we shall take the maximum figures for expenses which there is any evidence to support.

If all the twelve grade crossings on the branch are to be eliminated, the Company's share of the cost would be about $2,000,000 (R. 46). The added annual charges due to this cause would, therefore, be the interest upon this amount.

The State Constitution (Art. VII, Sec. 14) authorizes the appropriation of $300,000,000 for the elimination, under State supervision, of railroad crossings, at the expense of the State, railroad companies, counties and cities, 50 per cent. to be borne by the railroad company. It provides that "Laws shall be enacted to provide, so far as practicable, for repayment to the State of moneys advanced in aid of railroad companies, counties and cities, at such times, in such manner and with interest at such rate, that the State shall be able to pay when due the portion of the State debt equal to the proceeds which shall have been so advanced, and interest thereon." Section 14-b of the State Finance Law (as amended by Chapter 300 of the Laws of 1926) provides that such bonds shall bear interest

at a rate not exceeding 5 per cent. per annum. The State stands ready to loan to railroads the money necessary to meet their share of the elimination expense, at a rate of interest not in excess of what the State paid when it borrowed the money. In July, 1929, it was believed that the interest on these elimination bonds would be between 4 and 5 per cent.* (R. 439).

Assuming, as the Commission did, that the Company would have to pay the State on the basis of 4½ per cent., the annual cost to it of the necessary $2,000,000 would be $90,000, and it would save $37,300 now paid for grade crossing protection (R. 45). So, making no allowance for the amounts saved for grade crossing accident damages, there would be a net addition to annual charges of not more than $52,700. Adding this to the claimed deficit of $125,000, which is excessive (R. 54), there would be a deficit on the branch of not more than $177,700.

All the expenses together could not do more than reduce the amount which the Company might otherwise add to its surplus. In 1928, the sum of $4,682,656 was available for surplus. A dividend of $2,400,000 was declared, which left $2,282,656 actually added to surplus. Had there been no increase in net income (in 1929, it increased to about $6,322,943), the deduction of $177,700 would not have prevented the declaration of a 6 per cent. dividend, and could not have done more than reduce the amount which the Company added to surplus from $2,282,656 to $2,104,956. It would not, of course, reduce it by that amount, since the $125,000 had already been deducted in arriving at the net income and should not be deducted again.

It is apparent that this could not, by any stretch of the imagination, impair or affect the ability of the Company to carry on its interstate duties, compel it to raise interstate rates or to abstain from reducing them, require

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* The latest issue of these elimination bonds was on September 15, 1931, when $25,000,000 worth were sold to a banking group which specified a *3 per cent.* coupon (New York "Times," September 16, 1931, p. 25). At this rate, the annual interest charge would be $60,000 and the net annual addition to charges only $22,700.

it to forego needed interstate facilities, or raise the cost of securing capital from the State or elsewhere, especially where, as here, only about one-fifth of the Company's revenue comes from interstate commerce. *Res ipsa loquitur.*

Commissioner Aitchison said that "the connection with interstate commerce is tenuous and casual" (R. 51); that the burden upon interstate commerce was "undemonstrated in amount" and "tenuous in character" (R. 55); that "it is relatively a light burden" (R. 57-58); and that (R. 70):

> "If the applicant makes the required grade separation (which seems to be the whole sticking point) the manner and extent to which its ability properly to serve *interstate* commerce will be lessened, if at all, is left wholly to conjecture and inference."

He added (R. 71):

> "There are other means of insuring that interstate commerce shall not be burdened than by tearing up this needed, but neglected, little railroad."

The Court below found that to continue the branch would burden interstate commerce, saying (R. 746):

> "On the facts shown in this record, we are satisfied that the freight business on this branch of the railroad is sufficiently large in its interstate character to burden interstate commerce if the losses sustained continue."

The evidence shows that the revenue on the branch for 1928 was as follows: Passenger, $277,201.70; freight, $12,519.70 (R. 142E), and that 75 per cent. of the freight was interstate (R. 258).

As we have not fully fathomed the theory of the lower Court as to how this fact proves that there is a burden on interstate commerce, we can only repeat our conception of what the decisions of this Court require: We understand that, in harmony with the rule that a carrier

cannot claim the right to earn a net profit from every branch of its road (*St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649; *Northern Pac. R. Co.* v. *North Dakota*, 236 U. S. 585), the carrier's business must be considered in its entirety, in abandonment cases; that, therefore, a showing for abandonment is not made out in every case where a profitable road has a non-profitable branch; that, under the *Colorado* decision, there must be some *demonstrated* prejudice or *undue* burden on interstate commerce, before abandonment is justified; and that this means that the Commission, or the Court, should be able to, if it would, satisfy others as well as itself that there is some undue burden, and to indicate to some extent, at least, its character and amount.

We have tried to show that this has not been done either by the Commission or by the lower Court, and that, even allowing the most extreme claims of the Company, it cannot possibly be done. We submit that the Interstate Commerce Commission has no right to authorize the abandonment of this branch, with serious injury to the community, unless it can demonstrate that continued operation would impose a burden on interstate commerce, and that, having attempted to do so without any showing of an undue burden to be lifted, its certificate should be set aside.

V.

All the commissioners recognized that continuance of the Whitestone branch would impose no burden on interstate commerce, within the meaning of the *Colorado* case; and the majority acted on an erroneous theory of law, that proof of such facts was unnecessary.

On the hearing before the Examiner, the witness for the Company was asked by counsel for The City of New York to "explain how and to what extent the continuation of this line would be such a burden on the Long Island

Railroad Company as to interfere with its functioning in interstate commerce"; and objection to this, by counsel for the Company, was sustained on the ground that the witness was being asked for a *legal conclusion* (R. 454). Director Bartel, who was sitting with the Examiner, hastened to suggest another ground for justifying the exclusion of such testimony. He asked counsel for the City (R. 454):

> "Aren't you asking this man the very question which has been put up to the Commission to decide?"

There was no evidence from which the Commission could have decided that the continuance of the branch prejudiced interstate commerce or imposed any undue or other burden upon it; and the Commission made no attempt to decide how and to what extent, as a matter of *fact*, the continuance of the branch would interfere with interstate commerce. All that the majority of Division 4 could find to say in answer to the objection of the Transit Commission (R. 45) was (R. 47):

> "In the light of these facts the expenditure of approximately $2,000,000, or about $500,000 per mile, for the elimination of grade crossings, in addition to the operating losses sustained plus the interest charges on the cost of elimination, would constitute a waste of money *which could not do otherwise than impose burdens upon commerce,* both interstate and intrastate." (Italics ours.)

The inadequacy of the premises on which the alleged conclusion is based will be shown later on. At this point we are concerned only with the attempt, if any, which the Commission made to ascertain what the *facts* were as to the effect of the alleged losses on interstate commerce.

The majority of Division 4 argue that this loss *"could not do otherwise than impose burdens upon commerce,* both interstate and intrastate," without finding that these burdens were *unreasonable.* This argumentative form

is a clear confession that they are unable to point out any way in which the continuance of the branch would, as a matter of *fact,* impose any burden on commerce, either interstate or intrastate, to say nothing of an *unreasonable* burden. Moreover, as they argue it, the alleged burden would fall "upon commerce, *both interstate and intrastate.*" Bearing in mind that the most they could argue was that there must be some burden distributed somewhere between interstate and intrastate commerce (with the latter of which they have nothing to do), it is evident that they themselves could find no demonstrated prejudice to *interstate commerce* alone. The dissenting Commissioner (Aitchison), who confined himself to the point, said (R. 57):

> "Nothing herein shows that if this application is not granted the railroad will be prevented from performing *its Federal duty.*" (Italics ours.)

One of the two majority Commissioners (Woodlock) said that the Interstate Commerce Commission had rejected the suggestion that a prosperous carrier may not abandon a non-profitable branch line unless this branch imposes an *unreasonable* burden upon interstate commerce, and based his conclusion on grounds divorced entirely from any consideration of the effect on interstate commerce. Referring to the grade crossing elimination order (there is only one, although he assumes that all the crossings on the branch have already been ordered to be eliminated), he says (R. 49):

> "All that we are concerned with is their effect *upon the revenues upon the branch.*" (Italics ours.)

The report of the Commission on Reargument states (R. 62) that it will discuss the points raised in the petition of the Transit Commission, including those (R. 62) based on the lack of any evidence to show that continuance of the branch would impose any burden on interstate commerce. This discussion (R. 66-67) turns out to be, not one of *facts,* but one of *law.* It leaves one still in the

dark as to how a deduction from the surplus earnings of the Long Island can be traced to any effect on interstate commerce. It is a tacit confession that this cannot be done. It appears that the Commission acted because, in its opinion, the law as laid down in the *Colorado* case allowed it to do so. It thinks that it can act without any showing that the burden on interstate commerce is undue or unreasonable. It thinks that it can act when it finds that a grade crossing elimination is "unnecessary" or that the expense of it is too "unwarranted" or "excessive" to be added to the capital charges.

To prove this, let facts be submitted to a candid world, from the report itself. For convenience of making comment, the argument will be broken up into the following sections:

> "The evidence is to the effect that the applicant is a prosperous carrier and that it is in turn controlled by the Pennsylvania Railroad Company, which is well known to be among the strongest railroad systems of the country. We are unable to find justification in these circumstances for modifying in any manner our procedure upon this application" (R. 66).

Had the Commission been trying to find as a fact what effect, if any, the continuance of the branch would have *on interstate commerce,* it would not have been able to ignore entirely the prosperity of the Company. That is an important factor; for it may be, and in this case was, great enough to permit the absorption of branch losses in the profits of the road as a whole, without having any of it fall on interstate commerce. The Commission was not attempting to locate the incidence of the branch loss, but was, as the rest of its argument shows, acting on its opinion as to what the law permitted it to do.

> "Not only is the applicant an interstate carrier, but its Whitestone branch is used for the transportation of interstate traffic and its operations are

> inseparably connected with those of the applicant's system as a whole. We are of the opinion that we have jurisdiction in the matter of the application and that it must be exercised" (R. 66).

That is, it assumes that it has jurisdiction because the Company derives the lesser part of its revenue from interstate freight; and that, because it has *jurisdiction to hear* the application, it must have *power to grant* it.

> "It is true that even though we add to the applicant's transportation losses from operation of the branch the capital charge that would be imposed upon it by the proposed grade crossing elimination, the amount involved is relatively small when compared with the financial resources and transactions of the Pennsylvania System. Nevertheless it must be recognized that the conservation of the resources of any railroad system requires cognizance of items even less substantial than those here involved. Any unnecessary burden upon the transportation system of the country is an unreasonable burden" (R. 66-67).

The "conservation of the resources of any railroad system" is a commendable object, but one not within the powers of the Commission in an abandonment case, where it has merely to determine whether public convenience and necessity permit abandonment. To do this, it is required, first of all, to ascertain whether the continuation of the branch would impose any *demonstrated* burden upon *interstate commerce*. Its report shows that the Commission neglected this prosaic duty of fact finding for the loftier power of passing an adverse judgment on a State elimination order which no Court would do otherwise than approve. Apparently it confused its duties under other sections of the law with those in abandonment cases, and assumed that, in an abandonment case, the law required it to exclude from its valuation of the Eastern Group of railroads for rate-making purposes (R. 69) any charge which it regarded as unnecessary.

The dictum of the Commission that "any unnecessary burden upon the transportation system of the country is an unreasonable burden" is not a statement of fact, but of law; and unsound at that. In the form stated, it is not even true under the Fourteenth Amendment, which the Commission has no power to enforce.

Had it attempted to ascertain what, if any, burden the elimination expenses would impose on interstate commerce, its task would have been rendered more difficult, and even less possible, by the method it pursued; for as its quest is pushed from the Long Island, to the Pennsylvania, to "the transportation system of the country," the layer of the possible burden would become thinner and thinner to the point of the lowest possible visibility.

> "While it is true that loss from operation of a portion of a railroad system will not in every case justify the abandonment of such operation, it is also true that circumstances may justify the abandonment of an unprofitable line notwithstanding the prosperity of the system as a whole. The circumstances of each case must govern its disposition" (R. 67).

Our quarrel is not so much with the statement of these general principles as with the way in which they were applied, or rather with the fact that no attempt was made to apply them.

> "Considering all the circumstances, we are convinced that an expenditure by the applicant of about $2,000,000 in the elimination of the grade crossings on its Whitestone branch would be an unwarranted expenditure, if the transportation needs of the public now served by the line can be reasonably cared for otherwise. This view, and our proposed action, are, in our opinion, fully supported by the views of the Supreme Court regarding the purposes of the statute under which we take jurisdiction, as expresed in *Colorado* v. *United States*, 271 U. S. 153, from which we quote the more pertinent portion" * * * (R. 67).

The majority Commissioners, we submit, ignored the facts which show that there is no burden of any kind on interstate commerce and based their determination on a view of the law which led them to believe that they were authorized to permit abandonment in order to avoid some expense (characterized by them as "unnecessary," without any authority in law or fact), which would add to the capital charges. The dissenting Commissioners, who examined the case in order to see whether the continuance of the branch would, in fact, impose any burden on interstate commerce, said (R. 70):

> "The majority quotes from *Colorado* v. *United States*, 271 U. S. 153, as to the ways in which prejudice to interstate commerce may be affected when large expenditures in the local interest are required. It is noteworthy that none of the ways indicated by the Court is found here. *The applicant has not made out its case on the theory that they are.* If the applicant makes the required grade separation (which seems to be the whole sticking point) the manner and extent to which its ability properly to serve *interstate* commerce will be lessened, if at all, is left wholly to conjecture and inference. There is no intimation of record that any of the expenditures in question will compel the carrier to raise any reasonable interstate rates or abstain from making any appropriate reduction of such rates." (First italics are ours.)

Commissioner Lewis at first entertained doubt as to whether the abandonment should be permitted, but finally came over to the view of the majority; and for the same reason. His concurring opinion says (R. 69):

> "I have been of opinion that operation should be continued a sufficient time in which the Transit Commission might rearrange schedules which it is urged would improve the revenues of the branch. But against that arises the fact that such continued operation calls for the further outlay of $2,000,000 as stated in the report for grade separation [?] at a time when there is much doubt as to whether the revenues could be so improved as to justify per-

> manent operation. Therefore a $2,000,000 addition to the capital account of all carriers included for rate making purposes in the Eastern Groups seems to me to be unjustified. There seems to be no escape from such an investment which past operations indicate would likely be improvident. Therefore I must concur in the decision herein reached."

When it is understood that the Eastern group comprises most of the railroads in the northeastern United States (*Increased Rates, 1920*, 58 I. C. C. 220, 225) and that the valuation placed by the Commission on these roads amounts to $8,800,000,000 or nearly nine billion dollars (58 I. C. C. 220, 229), no one will question the justness of Commissioner Aitchison's observation (R. 71):

> "The fears of *Commissioner Lewis* that the aggregate value of the railroad property in the Eastern Group will be increased $2,000,000 by an expenditure which he believes may be improvident, seem to be an unnecessary borrowing of trouble."

In brief, the Commission recognizes that there will be no burden on interstate commerce, and decides the case on a theory which does not require it to find such burden. Confusing its duty over *valuations* with its power over *abandonment*, it holds that the addition of $2,000,000 to capital charges would be unwarranted, in view of the *possibility* that the branch might be rendered useless by the extension of the City rapid transit lines into that area. This explains why the Examiner excluded, as calling for a conclusion *of law*, testimony as to how and in what way the continuance of the branch would interfere with the ability of the Company to function in interstate commerce.

The unsoundness of this as a proposition of law is demonstrated by the *Colorado* case (Point III). If it be argued that the Commission, in passing on the *future* public convenience and necessity, can take into consideration the effect of a possible extension of the City lines into that area, the answer is that the Commission must

have evidence to support a guess about the future, certainly just as much as is required to support the finding of a present fact, and probably even more. It will be shown (Point VIII) that there is no evidence to support a finding that the City will extend its rapid transit lines into that area, while the area is being served by the Whitestone branch.

VI.

The evidence shows that the abandonment of the Whitestone branch would cause serious injury to the communities of College Point, Malba, Whitestone and Whitestone Landing.

As the continuance of the Whitestone branch will cause no prejudice to interstate commerce, there seems to be no ground justifying its abandonment. There is nothing that can be balanced against the unquestioned injury to the community.

Little need be added to the description of the four communities, in addition to that already contained in our statement (*ante*, pp. 5-6). They are separated from Flushing by a marsh*; and have no means of rapid transit to Manhattan, except the Whitestone branch. Local transportation to Flushing from College Point is furnished by a trolley line (R. 31, 400) and from Whitestone Landing and Whitestone by a bus line (R. 32, 407). Malba has no trolley or bus lines, its people being entirely dependent upon the Whitestone branch (R. 32, 404).

The trolleys to College Point and the busses to Whitestone afford only local service. The route made up of these lines and the City subway line is no substitute for through commuting service, because the running time, exclusive of waiting and walking time, makes the trip time too long. Exhibit 13—the time table of the Company (R.

* The streets which Exhibit 4 purports to show on the marsh are only "paper streets" (R. 365, 399-400, 625).

730A)—shows that the average running time on the Whitestone branch from College Point to the Pennsylvania Station, Manhattan, is about twenty-six minutes. The running time on the City subway from Flushing to Times Square, Manhattan, is thirty-three minutes (R. 402). The running time by trolley from College Point to Flushing is nineteen minutes, or a total of fifty-two minutes, just twice the time on the Whitestone branch. The average running time on the Whitestone branch from Whitestone Landing to Pennsylvania Station, Manhattan, is thirty-four minutes (Ex. 13). The running time on the bus line from Whitestone Landing to Flushing is twenty-two minutes (R. 407), which added to the thirty-three minutes on the subway from Flushing to Manhattan, gives fifty-five minutes, or twenty-one minutes longer than the time on the Whitestone branch. Moreover, the running time on these broken routes makes no allowance for time spent in waiting for the trolley or bus and in walking from there to the subway, or *vice versa*. It involves uncertainties and greater hardship and exposure in inclement weather, all of which tends to make such method even less suitable for commuting purposes.

The needs of commuters are not met by facilities which merely take them *out of* their community. They are met only by facilities which take them from their home *to their work*. They must not merely be able to *leave home;* they must *arrive at their destination*. The commuting connection between home and work cannot be maintained for masses of people by roundabout and time-consuming means of getting from one place to the other. To render commutation possible there must be through service. Long, broken trips with waiting delays and uncertainties cannot suffice to maintain it. Merely local service, whether by busses or otherwise, is an unsatisfactory makeshift and, so far as commuting traffic is concerned, is no substitute for through service (R. 508-509). So what these communities need is not bus service, which is only a local expedient, but through rapid transit service (R. 558).

Commuting traffic in a large metropolitan district, where workers have to go back and forth for long distances between their homes and their work, is not to be judged by the same standards as are the cases usually presented in abandonment proceedings, where merely occasional connection between localities is all that is involved. In the case of commuting traffic, with its daily ebb and flow of workers, there is a mass effect producing economic dislocations which are measured not only by the hardship to individual passengers, but also by the destruction of industries, the loss in property and tax values and the possible decay of the communities affected. Different localities compete for population by means of the excellence of their respective transit facilities; and those which have poor facilities, or none at all, fall behind or go to the wall.

The undisputed testimony of real estate men in the various localities, supplemented by that of one of the most prominent real estate men in Queens, is that the abandonment of the Whitestone branch would cause losses in real estate values of from 15 to 25 per cent. (R. 41). The assessed value of the land in all four communities is not in evidence; but that of College point is—$23,676,280 (R. 559). It is evident that even a 15 per cent. loss would run into millions and would be at least double the Company's share of the cost for eliminating *all* the crossings.

VII.

The Interstate Commerce Commission could not ignore the present injury to the community, on the theory that this would ultimately be corrected in the future, by the rapid transit line which the abandonment of the Whitestone branch would compel the City to build.

It must be presumed that the Commission knew that the community would suffer serious injury. It mentions some

of the evidence which shows it (R. 41). It seems to recognize it expressly (R. 64) and certainly does by indirection in its condition to the certificate, purporting to provide the palliative of busses operated by the Company, in place of those now operated (R. 58-59). It says (R. 47):

> "The establishment of adequate bus and truck service as proposed by the applicant would furnish transportation facilities to the area until such time as the rapid transit system may be extended or regular bus lines may be enfranchised."

In view of what is said in the preceding point and of what will be said hereafter (Point X), it is clear that "regular," in place of "irregular," bus lines will afford no substitute for the Whitestone branch. As there is no evidence that busses will do so, it must be assumed that the alternative reference to busses, which is always coupled in the reports with mention of the City rapid transit system, was merely thrown in for good measure, or to furnish a further possible support in case the other line of argument gave way. It is reasonable to suppose that the Commission knew that the City would not build expensive rapid transit lines, if private busses, which cost it nothing, would do just as well. It is clear enough that it recognized that there must be something like the Whitestone branch to take its place and that this something must be rapid transit. This was undoubtedly what it had in mind when it said (R. 67):

> "Considering all the circumstances, we are convinced that an expenditure by the applicant of about $2,000,000 in the elimination of the grade crossings on its Whitestone branch would be an unwarranted expenditure, *if* the transportation needs of the public now served by the line can be reasonably cared for otherwise."

The proposition that present injury can be ignored merely because there is a *possibility* that it may be corrected in the future is, it seems to us, too absurd to require

argument. Such *possibility* exists in every case. This Court says that abandonment can be granted only where the burden on interstate commerce (here non-existent) outweighs the injury to the community (here very serious). What would this rule amount to, if the Commission could ignore serious present injury, merely by pointing out that there was a possibility, or even a probability, that a substitute could be provided in the future?

We think it may be said with confidence that an attempt to force the City to spend millions, in order to remedy a condition created by the action of the Commission itself, for the purpose of relieving the carrier from the performance of its public duties, would be the clearest abuse of discretion, as a direct attempt to dictate State and municipal policies.

VIII.

There is no evidence in the case that the City will extend its rapid transit system into the area, unless the Whitestone branch is abandoned.

Not a bit of evidence was introduced at the hearings showing, or tending to show, that the City had any plan for extending its rapid transit system in that direction. The Examiner, who took the testimony and heard the witnesses, said that "no one seems to know whether the rapid transit system will be extended into the area served by the branch" (R. 28); and it is interesting to note that his recommendation that abandonment be permitted, unless the grade crossing elimination order was revoked, was not based on the probability that the City line would be extended there, but on "the *uncertainty* of the course of action which may be taken by the City in the future," and on the possibility that the "entire branch *may be* rendered practically useless at any time by the extension of the rapid transit system" (R. 29).

It is true that earlier in his report, he refers to the "*probable* ultimate extension of the rapid transit system

or the establishment of bus service in the area involved" (R. 27); and says that "the *indications* are that the transportation facilities in the area served by the branch are now in a state of transition from the service furnished by the applicant to service by those instrumentalities" (R. 29); but there was no evidence on which to base his opinion as to "probability" or to show what were the "indications" that influenced his mind.

In its exceptions and brief to the Examiner's proposed report, the Transit Commission said:

> "We think it fair comment to say that the Examiner relies too much on his gift of prophesy. The Proposed Report itself states that 'no one seems to know whether the rapid transit system will be extended into the area served by the branch * * * or whether the City will enfranchise a bus company to operate in that area' (S. 16, lines 25-28). If no one else knows (and the record supports that), it seems clear that his vision must be the product of divination. It does not extend, however, so far as to enable him to say whether it will be rapid transit *or* buses. He is rather sure that it will be one or the other, but he does not know which. It will be observed that the utterances are all tempered with the usual reservations of the prudent prophet—'probable,' 'indications are,' 'uncertainty,' 'may be,' and 'practically.'
>
> There is, as the Report itself shows, no evidence that the branch will be rendered useless or that its continued existence cannot be justified or that it may be rendered practically useless by the extension of the rapid transit system or the establishment of bus service. All that can be said is that there is a *possibility* of rapid transit or buses, which the Examiner converts into a *probability*. In view of the fact that no one knows (S. 16, line 25), this seems to be unwarranted.
>
> We do not rest on the fact that there is no evidence of this probability. We shall try to show why it is an improbability."

The Transit Commission then pointed out that, owing to its debt limit (N. Y. Constitution, Art. VIII, Sec. 10), the City of New York is financially unable to build subways everywhere; that it must, therefore, build with reference to the most urgent needs; and that, other things being equal, it would not encroach upon its debt limit by building routes in areas already provided with other rapid transit facilities, to the exclusion of areas which have no rapid transit facilities at all, especially where the route runs through long stretches of territory not capable of being built up—like the Flushing marsh—and where the potential earning capacity is reduced by the necessity of building through such areas in order to reach population centers. It referred to the Rapid Transit Act (L. 1891, Chap. 4, as amended) to show that the recommendations of the Board of Transportation, the engineering agent of the City in such matters, could not be carried out without the approval of the Board of Estimate and Apportionment, the financial and appropriating body. It also pointed out that the least expensive of the three plans considered by the Board of Transportation for converting the Whitestone branch into a part of the City's rapid transit system, would be approximately $9,000,000 (R. 655).

The exceptions and argument afforded an opportunity for the revision of the report. The report of Division 4 omitted the Examiner's statement that abandonment was recommended in view of "the *uncertainty* of the course of action which may be taken by the City in the future" and, although no additional evidence had been taken, substituted the following (R. 46):

> "From the standpoint of the future it is indicated that it is only a question of time before the area in question will be served either by an extension of the rapid transit system or by busses. This fact is conceded by counsel for the Transit Commission in his brief in the following language:

> 'As long as the Whitestone branch continues to operate, it is improbable that the City will extend its rapid transit lines into that area, although we understand that, since this application for abandonment was filed, the Board of Transportation has prepared tentative plans for extension into that area. We think, however, that the City should not be forced to incur great expense in order to fill the void left when the applicant divests itself of its obligations.' "

This, in turn, was attacked by the Transit Commission on the reargument before the full Commission, where the arguments contained in the brief before Division 4 were elaborated. The report on reargument disposes of this by suggesting that counsel for the Transit Commission was not authorized to speak for the City (R. 66).

In showing the improbability that the City would extend its rapid transit system into the area so long as the Whitestone branch continued, counsel for the Transit Commission was not attempting to speak for the City or to testify. He understood that counsel are never permitted to testify on a reargument.* His point was that there was no evidence that the City would extend its rapid transit system; that the reliance upon the quotation from his brief *showed* that there was no evidence; and that a statement that it was *improbable* that the City would build could not be taken as a concession that it *would* build. His criticism was that the Commission made a prophecy without any evidence to support it.

That the Commission completely lacked evidence that the City's rapid transit line would be extended to the area, while the Whitestone branch continued to operate, is also

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*See R. 64, where it is noted that, on reargument, counsel for the Transit Commission "could give no definite information" as to the accidents resulting in death which had occurred at the Northern Boulevard crossing. Counsel wishes to state that he did not make the remark describing the crossing as a "frightful place." That this remark is attributed to him in the minutes is due to his failure to notice and so to have corrected an error of the stenographer as to the identity of the speaker. The Transit Commission had asked for a *rehearing* (R. 216), but this request was not granted, a *reargument* being granted instead (R. 228).

to be inferred from other remarks. For example (R. 61):

> "The area served by the branch was increasing rapidly in population, *justifying the conclusion* that extension of the City's rapid transit system to serve the territory would eventually be necessary."

and (R. 72):

> "The condition imposed upon the abandonment by the certificate was intended to insure a satisfactory substitute service for both passenger and less-than-carload freight, pending the conclusion of other arrangements *that may reasonably be expected* to be developed in the process of the City's growth and the extension of its transportation system."

Can it be doubted that, if the Commission or its Examiner knew of any such evidence, they would have hastened to use it, in place of such vulnerable conclusions, especially since the reports are full of immaterial minutiae, such as slurs on the interveners (R. 28) and comment on the failure of the parties to answer the self-serving letters of the Company (R. 33-34)?

In its brief before the Court below, the Interstate Commerce Commission marshaled the various circumstances which it relied upon in support of the finding as to the ultimate extension of the rapid transit system into this territory. Chief among these was the alleged concession by counsel to the Transit Commission, which has just been discussed. The others, in the language of the brief, were as follows:

> (1) "Mr. LeBoutillier, the carrier's Vice-President, expressed it as his opinion that within a reasonable time the city would extend its rapid transit line."
>
> (2) "Mr. Rawson, the company's engineer, said they did not want to go to the expense of eliminating grade crossings and then have the traffic all taken away by the Rapid Transit Lines."

(3) "Mrs. Anna Meech, a realtor at Beechhurst, admitted that there was a difference of opinion as to whether or not abandonment will not bring about rapid transit service."

(4) "The testimony of Mr. E. O. Champ, realtor at Malba, indicates that while the residents there are 'almost unanimous in favor of railroad service' some of them are working for an extension of the Rapid Transit Lines."

(5) "The North Shore Chamber of Commerce favors rapid transit service and is actively furthering it."

(6) "Pertinent in this connection is the report [April 18, 1931] of the special committee appointed to consider the offer made by the carrier to quitclaim the branch, which offer was denied."

None of these circumstances rise to the level of evidentiary matter, with the possible exception of the last, which will be mentioned later.

The above enumeration omits the very thing which, apparently, led the Interstate Commerce Commission to opine that the "indications" were that the City would extend its rapid transit line into that area, namely, something submitted by the Company in its petition, dated September 17, 1929, for reopening the hearing (R. 190), and which has been certified by the Interstate Commerce Commission as part of the record. That is a statement purporting to have been issued by the Board of Transportation "for release in the newspapers not earlier than morning editions of Monday, September 16th, 1929," which sets forth, among a great number of proposed routes, plans for two extensions to its Flushing subway, one continuing easterly, in the direction now followed, nearly to Little Neck Bay, and the other, branching off from this at right angles and passing through Whitestone and Malba to College Point, where it would come to a dead end.

The Company alleged that this showed "that the City of New York definitely plans and intends to construct a rapid transit extension or branch to service Whitestone,

College Point, and all of the territory now served by the Whitestone branch of the Long Island Railroad" (R. 191). These were the tentative plans referred to in the brief of the Transit Commission on exceptions to the Examiner's report.

The petition of the Company to reopen the hearing, in order to introduce this newly-discovered "evidence" indicates its opinion that, without it, there was no evidence showing that, so long as the Whitestone branch continued, the City would extend its own line into that area.

This application for a reopening of the hearing was not opposed by the Transit Commission, which was confident that, given an opportunity to do so, it could prove that these were tentative plans prepared in view of the emergency that would be created, if the Whitestone branch were abandoned, and that the City would not extend its line, so long as the Whitestone branch continued.

The Interstate Commerce Commission, however, denied the application to reopen the hearing, by order dated October 3, 1929 (R. 215), nearly a month and a half before the Examiner submitted his proposed report (November 14, 1929). This matter, therefore, is not in evidence; and interveners have never had any opportunity to be heard upon it. It cannot be relied upon as evidence to support the Commission's opinion as to the "probabilities" or "indications" of the case; and, if it appears that the Commission was influenced by it, its determination was void and should be set aside because based on matter on which no hearing was held.

In *Interstate Commerce Commission* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92-93, it was said:

> "A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551.
>
> The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission

> to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. * * * In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding."

As we have shown, the determination of the Commission was not based upon the branch deficit and the decline in traffic alone, nor apparently was it even based upon these plus the grade crossing elimination expense, but upon all these things together, *in the light of the assumed fact that the City would extend its line and so render the branch practically useless* (R. 27, 46, 47, 61, 65). As there was no evidence to support this latter assumption, we surmised that the basis of it was the statement submitted by the Company. By a rather unusual circumstance, verification of this surmise is furnished by the answers of the Commission and of the Company.

The petition of the Transit Commission, in Article 5, alleges (R. 3):

> "The only evidence before the Examiner consisted of that introduced at the hearings by The Long Island Railroad Company and by the said interveners and of the return filed by The Long Island Railroad Company to a questionnaire submitted by the Interstate Commerce Commission."

This is denied by the answer of the Interstate Commerce Commission and by the answer of the Long Island Railroad Company, which expressly admit part of Article 5, excluding the part above quoted (R. 78, 81) and then expressly deny all allegations not expressly admitted (R. 80, 85).

These appellees, which were in the best position to know, say, in effect, that there *was* other evidence before the Examiner, besides that which we supposed and alleged. Not only this, but both answers contain highly significant affirmative allegations, e. g., the following (R. 79-80, 85):

> "The Commission further alleges that, in making said reports and orders, *it considered* and weighed carefully, in the light of its own knowledge and experience, *each fact, circumstance, and condition called to its attention on behalf of the parties* to said proceeding *by their respective counsel*, including all matters covered by the allegations of the petition herein."

Clearly the newspaper statement by the Board of Transportation, which was called to the attention of the Commission by the attorneys for the Company, but was never made the subject of a hearing, must have been the thing referred to in the affirmative portion of its answer and regarded by it as "evidence" before the Examiner. If it was not that, but some other unknown bit of alleged information, the situation is in no way improved.

The bare possibility that the City might extend its rapid transit lines, because it had power to do so, and thus

render the branch practically useless, is not a sufficient reason for abandonment. Such possibility exists in every case. There must be some showing of certainty or, at the very least, probability that a new competitive line would be built. Assuming that the Commission regarded this new line as probable, it had no evidence to support its view.

The fact of what the City, through its Board of Estimate and Apportionment, intends to do ought to be a notorious fact, easily ascertainable from official records. It ought not to be inferred from suggestions let in through the back door without a hearing. In listening to such suggestions, the Interstate Commerce Commission ignored the fact that there was no evidence brought out at a hearing, ignored the probabilities, and assumed that the Transit Commission would recklessly pour $2,000,000 of the public money into an improvement soon to pass away.

A similar situation is presented by the statements incorporated in the Company's application of May 13, 1931, to fix an effective date (R. 99, 103), which were designed to create the impression that the Board of Estimate and Apportionment had declared the policy of the City to progress the extension of *the Flushing route*. This is the matter, already referred to (*ante*, p. 65), which the Interstate Commerce Commission, in its brief below, regarded as "pertinent." The verified reply of the Transit Commission *denied* these allegations and submitted "that there is no evidence upon the record to support the allegations of said petition and that in the absence of such evidence the application should not be granted" (R. 234).

Both these things got before the Commission without any hearing or any opportunity for the interveners to object, cross-examine, explain and rebut*; and the action of the Commission, in this respect, also invalidates its order and requires that it be set aside.

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*In its recitals the original order speaks of "a *hearing and* investigation" (R. 58), while the final order speaks merely of a "further *investigation*" (R. 77).

IX.

Other findings essential to conclusions suggested by the Interstate Commerce Commission were also without evidence to support them.

In abandonment cases, this Court examines the evidence in order to see whether there has been an observance of its rule that the Commission must reach its determination, by balancing the demonstrated prejudice and undue burden on interstate commerce against the injury to the community. (271 U. S. 153, 166, 169). Otherwise, the rule itself would be futile and impotent. As the Courts cannot substitute their judgment for that of the Commission, where there is any substantial evidence which might reasonably support the latter, it is especially necessary that they should carefully scrutinize the evidence to see whether there is any, upon which the Commission's determination might have been based. So much is absolutely required, if the Commission is to be kept within the bounds imposed by law, and if the localities are not to be subjected to injury through the exercise of arbitrary authority. "The more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended" (*Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 93).

Furthermore, it should be noted that, in abandonment cases, the Commission, upon which the whole duty rests, takes no part in bringing out the facts, either by testimony of its own inspectors or by evidence from the companies' own reports on file with it. It turns the matter over to an Examiner, who sits like a court, and receives such evidence as may be hurriedly gathered by State officials, who have no duty or responsibility in the premises, except to see that the rights of their States are not abused. This Examiner selects, arranges and interprets this evidence in a report which becomes the basis for Commission action.

Courts cannot directly compel the adoption of other means for ascertaining the facts on which these important decisions are based; but they may nullify these decisions where the evidence thus assembled is insufficient for the purpose; and that is sufficient.

An administrative body is not a court and cannot render judgment by default. It is not rendering judgment between litigants—the Company and the State. The law requires and permits it merely to find a certain state of facts, namely, what public convenience and necessity permits. For this, evidence is necessary; and, if this is lacking, its decision must be set aside.

The real ground and reason for the Commission's determination was that $2,000,000 was an excessive amount to add to capital charges (Point V); but the subordinate who prepared the reports was evidently anxious to fortify his conclusion in every possible way and to make it appear, if possible, that the case also came within the ruling of the *Colorado* case, which the real ground of determination either ignored or misunderstood.

It was recognized that abandonment was not justified by *present* conditions (R. 14). The determination, therefore, had to be based on conditions that might arise in the future; and this involved the making of prophecies, which, we contend, require more, rather than less, evidence to support.

The basis of this alternative line of argument was that, since the City had power to build rapid transit lines, there was a possibility that it might do so; and that, if it did, the Whitestone branch would be rendered "practically useless." This *possibility* was somehow converted into a *probability*. This has been disposed of in the preceding point.

The reports also threw out other alternative suggestions, the sophistry of which might elude detection or involve us in a maze of arguments—as, for example, that, even if the rapid transit line is not extended, the branch cannot compete with the existing rapid transit line which terminates at Flushing. These dogmatic statements are easy

to make and somewhat laborious to expose. We regret having to burden the Court with so much demonstration; but it seems unavoidable; and, therefore, we must proceed to show that these other alternatives also lack evidence to support them.

1. The report of Division 4 says that "from the standpoint of present conditions on the branch the record shows that while the population of the area has increased, the earnings of the branch have declined sharply and that such decline is *progressive*" (R. 46). If we take "progressive" to mean "continuous up to the time of the hearing," this would be true of *present* conditions; but the reports show that present conditions do not justify abandonment. It is, therefore, not present, but *future* conditions, which are being considered; and this requires a finding, not merely that traffic has declined and that the decline was continuing, but that the decline would still continue in future.

Of this, there was no evidence whatsoever. All that the vice-president of the Company could say was that the loss would be progressive *if* the City should extend its rapid transit line (R. 282). The only testimony bearing on the point was that of the Chief of the Service Bureau of the Transit Commission, who gave his expert opinion that the effect of the existing subway to Flushing might be manifested in a little more loss to the branch, but that it would not be progressive to any extent, as all the people who would have been influenced had already taken advantage of the City line. He would say that the traffic on the Whitestone branch had reached a point where it was constant, if not subject to slight increases as the territory builds up more (R. 414-415).

In addition to the fact that there was no evidence to that effect, it is improbable that traffic will continue to decline on the only rapid transit line serving isolated communities which are increasing in population.

2. The reports say that the branch cannot compete with the existing City line which terminates in Flushing (R. 46, 62). If this means that the branch cannot compete with the City line for *the traffic in Flushing*, we agree with it. Flushing is by far the largest of the five communities. The City line has a more centrally located station than the Whitestone branch, a more frequent service, and a lower fare. It is, therefore, only natural that when it opened operation, practically all passengers *in Flushing* resorted to it in place of the Whitestone branch. The sharp decline in traffic on the branch coincided with the opening of the City subway in January, 1928.

But to have any significance in relation to future effect, the statement of the Commission must mean more than that. It must mean that the branch cannot compete with the City line (which reaches no further than Flushing, in a direction roughly parallel with the communities on the ridge) for *the traffic in College Point, Malba, Whitestone and Whitestone Landing*. The evidence shows that further loss in traffic from those communities to the City subway is improbable. Point VI shows that the time consumed by taking local transportation from those communities to Flushing and the subway from Flushing to Manhattan is too long. From College Point it is double that on the Whitestone branch; and from Whitestone Landing twenty-one minutes longer than on the Whitestone branch. There are, too, other delays and inconveniences. The difference in fare is comparatively slight. From College Point the commuter pays 11 cents to go to Manhattan, by the indirect route, and only 13½ cents by the direct route (R. 31). Under these circumstances the indirect route holds no lure for commuters.

3. The Commission states that "The applicant contends, and we believe rightly, that with the inauguration of express service on the rapid transit line a still further decline in the traffic of the branch will occur" (R. 63). There was no evidence to support this belief. There was some against it. The Chief of the Service Bureau of the

Transit Commission testified that, if express service were installed, it would cause very slight loss, if any, to the Whitestone branch (R. 414).

More important still, there was no evidence that express service *would or could* be installed. All that its vice-president could say was that the Company would lose more of its passengers *if* there was express service on the subway (R. 282). On the other hand, the Transit Commission showed that there were practical, legal and operating difficulties to installing express service, which were then being considered by the Transit Commission at hearings. These difficulties were the lack of signals and equipment, and the contractual right of the New York Rapid Transit Corporation (which cannot operate through service on the express track) to claim at least 50 per cent. of the capacity of that line, the Interborough Rapid Transit Company (which already operates the most cars over the line) being the only one which can operate through cars (R. 410-412).

It may be permissible to add that the hearings before the Transit Commission resulted in no solution of this express service problem which has vexed successive commissioners for years and some phases of which have reached the courts (*People ex rel. Delaney* v. *Interborough R. T. Co.*, 192 N. Y. App. Div. 450 [1920]).

We think we are entitled to object to an attitude which deliberately ignored the testimony of those familiar with the situation, in order to accept the mere suggestion or guess of an uninformed and interested witness.

4. As an explanation of the failure of the branch traffic to increase with the increasing population, it was pointed out by interveners that the Company had so spread the service that no branch train arrived at Pennsylvania Station between 8.12 A. M. and 9.09 A. M. (R. 419), the latter usually being late. For commuters who had to be at their offices by 9 o'clock, the former was too early, and the latter too late. The Transit Commission offered to

change the schedule so as to permit the operation of a train which would bring back these 9 o'clock commuters. To this, the Commission directed a long argument to the effect that this was not feasible (R. 63-64).

There was, however, no evidence that it was not feasible. Commissioner Lewis thought it should be given a trial (R. 69); and Commissioner Aitchison said (R. 54):

> "The claim of the users of the branch has good support that the unsettled condition of affairs due to the pendency of this application to abandon, and regression in the standards of service have repelled traffic which would normally fall to the line."

For some reason—certainly not based on evidence—the writer of the reports manifested a chronic distrust of statements made on behalf of the Transit Commission, both as to express service on the City line and 9 o'clock service on the Whitestone branch. What we thought impossible, he thought possible; and what we thought possible, he thought impossible.

It is apparent that everything has been done to discourage traffic on the branch, in order to advance the showing for abandonment. The vice-president, who testified, came down from the Pennsylvania in January, 1923 (R. 248). Almost immediately they began considering abandoning the Whitestone branch (R. 289), and have been discussing it ever since (R. 268). At that time there was no subway; and the abandonment of the branch would have saved the expense of it, while sending all Flushing passengers to its Port Washington branch and compelling others to get there somehow. Then the service was spread so that persons failed to get to the office, and children failed to get to school on time (R. 517). The Company took no steps to stop the illegal bus line which was established in 1924 (R. 407), although it claims it was cutting into its traffic. It might carry 9 o'clock commuters to the Company's own Port Washington branch. This same vice-president directed the filing of this application (R. 262).

If it becomes clear that the branch cannot be abandoned, the Company will again be interested in encouraging, rather than discouraging, traffic; and regulatory measures to this end will probably not be required.

5. Interveners claimed that the alleged deficit of $125,000 was excessive. The Commission made no finding as to the exact amount. The report of Division 4 merely said that "The operating loss for 1928 *is estimated* at $125,000 and for 1929 at $150,000" (R. 46). There was some evidence as to the former, but none as to the latter estimate. The report on reargument contented itself with the observation that the evidence showed "that the traffic and revenues of the branch had *for some years** been progressively and rapidly declining" (R. 61).

Interveners pointed out that the expenses for 1928 were abnormal (R. 294-295); that large amounts were prorated to the branch; and that these did not represent amounts which would be saved if the branch were abandoned (R. 296-301). The report of Division 4 said (R. 43):

> "There can be no doubt that where amounts are prorated as in the present case (which method is followed by the applicant in accordance with our regulations) they cannot be accepted as strictly accurate, but *they do give a fair indication of the actual situation.*"

Commissioner Aitchison differed on this latter point, saying (R. 54):

> "But comparatively small as are the claimed deficits, the basis of the apportionment which produces them is open to serious question. The apportioned costs include the general expenses and overheads, including taxes and rentals for the use of the Pennsylvania station in New York. This might

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*Cf. Opinion of Commissioner Aitchison (R. 54):

> "The claimed deficit is small *and of recent origin.* Applicant's showing is that until 1927 the branch yielded a net railway operating income. The deficit claimed for 1927 was $18,468, and for 1928, $125,759."

This statement is substantiated by the evidence (R. 38).

> be proper, at least as an initial study in a case involving the reasonableness of rates; but *here the question is as to the amount of the financial burden on applicant which will be lifted if the line ceases operation.*"

These opposing views seem to raise a question of law for the Court (*Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92), which admits of only one reasonable answer. Since abandonment is granted only to lift a burden from interstate commerce, the thing to be considered in determining what that burden is must be the amount saved, and not some apportioned sum which includes amounts not saved. There was no finding by the majority as to what the deficit would have been, or whether there would have been one, had these amounts which would not have been saved been deducted from the estimate of operating expenses.

6. The Examiner's statement that "deferred maintenance on the branch is estimated at between $15,000 and $20,000" (R. 21) naturally conveys the impression that some more or less careful study preceded this estimate. The exact words of the Company witness, when asked by the Examiner if there was any deferred maintenance accrued on the branch, were (R. 314-315):

> "A. Well, I should say that there probably was. I explained in my testimony yesterday, we have spent just as little on that branch for the past four or five years as we possibly could—just enough to keep it in an operative condition, and I think that if we are not permitted to abandon it, we will probably have to spend a little more money in the next two or three years, to bring it up to what we might call a standard condition. In that case I should say there probably was some deferred maintenance.
>
> Q. Have you any idea as to the probable amount of deferred maintenance? A. Not directly, no. That branch, of course, is not very long, and I see on these roadway and track accounts last year we spent approximately $16,000-$18,000; that is road-

way maintenance, ties, rails, other track material, ballast, track laying and surfacing, and that is about $4,000 a mile. Now it might be that the deferred maintenance would be something on that order. I do not think that—$15,000 to $20,000, I think, would represent the extent of the deferred maintenance."

At the hearing on the day preceding, the witness had explained that the increase in expenses for maintenance of way and structures in 1928 over 1927 was due to deferred maintenance (R. 294), saying, "We spent just as little as we possibly could on that branch for the past several years, five years or more" (R. 295).

In our brief on exceptions to the Examiner's report we contrasted the testimony given in 1929, that for "five years or more" or "for the past four or five years" they had spent just as little as they could, with the Company's evidence in 1927 that the expenses for maintenance on the whole road in 1924, 1925 and 1926 were exceptionally high and that there was no improperly deferred or neglected maintenance on the Long Island property or any part thereof (*Re Long Island Railroad Co.*, P. U. R. 1928C, 748, 786, 788, 800). The Examiner's statement (R. 21) was repeated *verbatim* in the report of Division 4 (R. 39).

7. Reports in narrative form, which are full of statements as to what the Company "alleges," "contends," "believes," "estimates," etc., place additional and unwarranted barriers in the way of those who seek to upset the order, and increase the difficulty of doing so; and the same is true where the requirements of Equity Rule 70½ are met only by a certain type of opinion. It is clearly in the interest of the States that the Commission, and the Courts, should come out into the open, with the facts which they claim justify taking away from the State its right to look to the carrier for the performance of those obligations which it assumed as a condition to the grant of the rights which it enjoys.

To say that applicant "believes" or "contends" that a thing is so may be a fact, but it is not an evidentiary fact.

Its effect is psychological, rather than logical. It is one of a series of strokes tending to enhance the impression that the Company is in a bad way. It is not a finding that the thing "believed" is true; but it gives the Commission this advantage: It avoids the responsibility of making a finding; but, if pressed to the point where such finding is necessary, permits it to urge that it must be presumed that a finding was made.

Courts cannot substitute their judgment for that of the Commission; but we submit that they are not obliged to assume that the Commission exercised its judgment when, in fact, it did not. Judgment is a conclusion formed from premises. A statement that a company "believes" thus and so is not a judgment, because it is not based on evidentiary premises.

In these abandonment cases a procedure has gradually grown up, by which every possible obstacle is thrown in the way of preserving the rights of the State. Such hearings have come to take on the character of an order to show cause why the abandonment should not be granted, with the presumption in its favor, where any loss is shown, with only the State active in opposition, and with the Interstate Commerce Commission using none of its powers to develop the facts. We submit that this presumption should be reversed, and that the right to a fair hearing involves something more than adherence to a routine procedure.

Int. Com. Comm. v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing cases), or, if the facts found do not, as a matter of law, support the order made."

X.

No amount of busses would ever serve as a substitute for the Whitestone branch; and there is no evidence to support the suggestion that they would.

The opinion of the Court below states (R. 745):

> "The Commission found that bus passenger service and motor truck freight service would adequately meet the requirements of the communities served by this branch."

With due deference to the Court below, we point out that the Commission made no such finding. This statement in the opinion is apparently an inference which the learned Judge drew from the fact that, at one stage of the proceeding, the Commission sought to soften the blow to the communities, by requiring the Company to substitute bus and truck service for the rapid transit service which it proposed to abandon, until the City line could be extended there. The reports of the Commission may be searched in vain for any such finding; and the record may be searched in vain for any evidence to support any such finding.

Mere forms of expression often suggest implications which have no support in fact. So, when the Commission attached to its certificate the condition that, coincident with abandonment, the Company must operate busses, if it could lawfully do so (R. 59), and when the writer of the reports habitually couples references to busses with those to the rapid transit system, it may have been intended to convey the impression that busses and rapid transit systems were of equal value and that busses would provide an adequate substitute for the Whitestone branch. If so, it need only be said that no evidence was brought out at the hearings to support any such impression. It is possible, but immaterial, that, if the Commission ever entertained any such belief, it derived it from "its own knowledge and experience" (R. 79). Certainly, the evidence taken at the hearings is devoid of anything showing

that busses would or could afford a substitute for the Whitestone branch.

That the Commission was not ignorant of the fact that the only possible substitute for the branch was something of the same general nature, namely, an extension of the rapid transit system, is revealed when it says that "The area served by the branch was increasing in population, justifying the conclusion that extension of the City's rapid transit system to serve the territory would eventually *be necessary*" (R. 61).* That this extension would be necessary while the Whitestone branch continued, cannot be supported from the evidence or from probability. That it would be necessary after the branch were abandoned is clearly true. Even in that event, it would not be necessary if busses would do just as well. The Commission thus recognizes that busses would not do just as well as a rapid transit system; and it would be absurd to suppose that it ever really believed that they would. Its reliance upon the agitation for rapid transit (*ante,* p. 65) is another recognition of the same thing.

We have already shown in Point VI why busses can never be a commuting substitute for such things as the electrically operated Whitestone branch or the City rapid transit system. Busses furnish only local service, which is inadequate for commuters who require through rapid transit.

In addition, it should be pointed out that there is already a bus line on the only highway to Flushing on which a bus line could be operated. A bus franchise could not be granted for the only highway connecting College Point and Flushing (R. 264, 401), because there is a trolley line on that highway (R. 400) and, therefore, no certificate of convenience and necessity could be obtained for a competing transit line (*People ex rel. N. Y. C. & H. R. R. Co.* v. *P. S. Com.*, 227 N. Y. 248, 256). The Commission in the condition to its certificate did not require the Company to operate substitute busses on this route (R. 59). There

* See also Commission's statement that "the applicant offered to establish and maintain satisfactory bus and truck service until *proper* transportation could be otherwise provided" (R. 61).

is only one highway—narrow and full of dangerous curves (R. 618)—which connects Whitestone with Flushing (R. 404, 620, 624). These two highways are separated by the marsh, which is a little less than a mile wide (R. 401). There is already a bus line on this second highway, but it is an unauthorized line because it has no franchise and no certificate of convenience and necessity (R. 424-426; *Huff* v. *City of New York*, 202 N. Y. App. Div. 425, 426-427; *Klinkenstein* v. *Third Ave. Ry. Co.*, 246 N. Y. 327, 331).

The possibilities of busses are thus limited by surrounding physical conditions. Nor, as a transportation matter, would the public be much benefited merely by a substitution of bus operators. The taint of illegality would, of course, be removed; and it is hoped that it would render better service, but obviously what it could add to present facilities would be negligible from the viewpoint of thwarted commuters. It ought to be clear that any attempt to create the impression that busses could furnish a substitute for the Whitestone branch should not mislead anybody.

XI.

The considerations previously set forth apply with increased force in this case, in which a lucrative intrastate traffic, of which the Whitestone branch traffic is part, is supporting and carrying a comparatively unprofitable and entirely dependent interstate traffic. The rationale of *The Shreveport Case*, 234 U. S. 342; *Colorado* v. *United States*, *supra*, and other cases is wholly lacking here. Congress did not intend, nor does the Constitution permit, that an incidental and dependent interstate traffic should be used to provide color for Federal interference with a self-contained and highly remunerative local traffic.

The opinion of this Court in *Colorado* v. *United States*, *supra*, and those of the cases cited therein, are bottomed

on a state of facts far different from that now before the Court. Those opinions contemplate a traffic mainly, or at least substantially, interstate, and they hold that this interstate traffic must not be prejudiced because of the State's interest in local traffic. But that is not the situation here. A lucrative intrastate traffic, of which the Whitestone branch traffic is part, is carrying, and indeed, as we shall show, creating the interstate traffic the "protection" of which has been held to authorize this radical interference by the national government.

MINOR AND DEPENDENT CHARACTER OF INTERSTATE TRAFFIC OF THE LONG ISLAND.

Of the Company's total railway operating revenues for 1928, namely, $40,532,571, the sum of $26,460,389 was passenger, practically all intrastate, and the sum of $11,605,106 was freight, of which about 75 per cent., or $8,703,829, was interstate. The comparatively unimportant aspect of its interstate traffic is further shown by the opinion of the Interstate Commerce Commission in the *Eastern Class Rate Case*, 164 I. C. C. 314, 441:

> "The Long Island Railroad is so peculiarly situated that its rate structure requires separate discussion. This carrier has 398 miles of line, of which 25.4 per cent are within the limits of New York City, and 939 miles of track, of which 46.8 per cent are in the city. Only 30 per cent of the gross revenue of the Long Island is derived from freight. Its freight tonnage in 1923 was approximately 8,000,000 tons, of which 87.6 per cent was interchanged with connecting lines at the western end of Long Island, and less than 10 per cent of this originated on Long Island. The average haul of the Long Island for all freight in 1923 was 20.82 miles. It has 32 agency stations in New York City. Since 1910 the local freight traffic on this road has decreased, although the population of the region which it serves has increased within the same period. Conditions on Long Island are favorable to the operation of motor trucks, which carry most

> of the local traffic except heavy commodities, such as stone and gravel. The Long Island's principal gateway for interchange traffic is Long Island City, but in times of congestion Bay Ridge is also used. It performs no lighterage service. Transportation conditions on the Long Island are much less favorable than those in trunk-line territory generally. Its freight-traffic density is low. Its freight trains are relatively light and are operated at a low rate of speed. Its fuel and wage expenses per unit are appreciably higher than those of other trunk lines."

This freight traffic is comparatively unprofitable. "Transportation conditions on the Long Island are *much less favorable* than those in trunk line territory generally. Its freight traffic density is *low* * * *. Its fuel and wage expenses per unit are *appreciably higher* than those of other trunk lines."

In other words, the interstate traffic of the Long Island Railroad Company is comparatively unprofitable and is almost entirely dependent upon its lucrative intrastate passenger traffic.

The Shreveport Case, Colorado v. *United States and other cases do not sanction the use of a minor and dependent interstate traffic as color for interference with a self-contained and highly remunerative local traffic.*

The situation here presented is very different from those in which this Court has authorized or sustained national interference in local affairs.

As stated in the *Colorado* case (271 U. S. 153, 164), the original and leading precedent for the authority of the Interstate Commerce Commission to interfere with local railroad commerce is *The Shreveport Case,* 234 U. S. 342. The fundamental principles there laid down are clearly inapplicable to the present situation. The Court there said, 234 U. S. 351, the italics being ours:

> "Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations

> in all matters having such a close and substantial relation to interstate traffic that the control is *essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.* As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or *preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care.*"

And again, at page 353:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used *in their intrastate operations to the injury of the interstate commerce.* This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."

This line of thought was followed in *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 585:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the

> country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*"

In the *Colorado* case, in which these principles were applied in an abandonment case, the Court made clear that the Federal power could be applied only where the interstate traffic was suffering from the State's control over local traffic. The Court said, at page 163:

> "Control is exerted over intrastate commerce only because such control is a necessary incident of *freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which* are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, *because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce.*"

As the situation is essentially and predominantly local, there is no warrant for Federal interference.

The situation here presented calls for an application of the doctrine stated by this Court in *Veazie* v. *Moor,* 14 Howard 568, and *Chicago etc. Ry. Co.* v. *Public Utilities Commission,* 242 U. S. 333, namely, that the Federal power does not apply where an "essentially local" situation is presented, and that it is necessary to show with "precision and certainty" that there is a prejudicial relation to interstate commerce.

In *Veazie* v. *Moor* this Court declined to hold invalid a statute of the State of Maine conferring upon designated persons a monopoly of trade on the Penobscot River between points wholly in Maine, on the ground that interstate traffic was thereby potentially affected. The Court said (p. 574):

> "In truth, the power vested in Congress by article 1st, section 8th of the Constitution, was not designed to operate upon matters like those embraced in the statute of the State of Maine, and which are essentially local in their nature and extent."

And in *Chicago etc. Ry. Co.* v. *Public Utilities Commission*, 242 U. S. 333, the Court limited the rule of *The Shreveport Case* to those instances where the relation to interstate commerce appeared "with precision and certainty." It said at page 338:

> "But a relation is asserted between the state and interstate haul because it is said to be manifest that the order of the state commission gives commercial advantages to shippers and producers of coal in Illinois over shippers and producers outside of the State. But there is nothing in the record that justifies the confidence of the assertion. There are too many factors to be considered for such offhand declarations to be accepted. Some relation we may admit between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in *Houston & Texas Ry. Co.* v. *United States*, 234 U. S. 342, but leaves it controlled by the *Minnesota Rate Cases, supra; Oregon R. R. & Nav. Co.* v. *Campbell*, 230 U. S. 525, and *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298. Therefore, the order is not subject to the charges against it and §§3, 13 and 15 of the Interstate Commerce Act have no application."

XII.

CONCLUSION.

Abandonment is a drastic remedy. It deprives the locality of needed service, and, where the road is prosperous, destroys the State's right to enforce the condition on which the grant to the carrier was made. It should not be exercised where there are other means of correcting losses; and cannot be exercised, except to free interstate commerce from undue burdens or demonstrated prejudice. Even where there is such demonstrated prejudice, abandonment should be granted only after a fair balancing of this burden against the injury to the community. It is "not to be judged in the light of what will best serve interstate commerce alone"; and to regard all interests except those of the community affected would be to create "a new and odious sectionalism" (*United States Feldspar Corporation v. United States,* 38 Fed. [2nd] 91, 95).

On this appeal we have a case where a carrier has been permitted to abandon, to the serious injury of the community, in order to prevent a comparatively slight reduction in the amount annually set aside to surplus. It is a case where about four-fifths of the carrier's earnings come from intrastate passenger traffic, and where the reduction in surplus earnings, if unreasonable, could be corrected by an increase in intrastate rates. It is a case where no burden on interstate commerce has been demonstrated.

The determination would not have been made had it not been for the order requiring the elimination of four grade crossings, the validity of which is not questioned. This abandonment, therefore, impairs the unquestioned right of the State to insist that grade crossings shall not be made dangerous, whatever the cost to those causing the danger.

The determination would not have been made had it not been for the belief on the part of the Interstate Commerce Commission that the City would extend its rapid transit line to the area and so render the Whitestone branch prac-

tically useless. There was no evidence, or probability, that the City would extend its line; and the Commission was improperly led to the belief that it would do so by considering misleading matter on which no hearing was ever had.

To force the extension of the City rapid transit line, in order to save the Company from a comparatively small reduction in the amount to be set aside annually to surplus, would be to interfere unwarrantably with the policy of the State and the municipality.

For these reasons we respectfully submit that

The order of the Court below should be reversed and the order of the Interstate Commerce Commission, adopted April 10, 1930, as modified June 17, 1931, should be set aside and annulled.

Dated, New York, November 11, 1931.

Respectfully submitted,

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APPENDIX.

Federal Statutes.

The pertinent provisions are paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act, which are as follows:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and

said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or inter-

urban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

United States Code, Title 28, Section 47, reads as follows:

§47. *Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable

damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

United States Code, Title 28, Section 47a, reads as follows:

§47a. (*Judicial Code, section 210.*) *Appeal to Supreme Court from final decree; time for taking; priority.* A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case

supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, §210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

State Constitution and Statutes.

Article VII, Section 14, of Constitution:

§14. The legislature may authorize by law the creation of a debt or debts of the state, not exceeding in the aggregate three hundred million dollars, to provide moneys for the elimination, under state supervision, of railroad crossings at grade within the state, at the expense of the state, railroad companies, counties and cities, as hereinafter provided. Of the expense of a grade crossing elimination to which any of the proceeds of such a debt are applied, fifty per centum shall be borne by the railroad company. The remaining fifty per centum shall be borne by the state and the county in which the crossing is located, or by the state and the city in which it is located if the city contain two or more counties; except that if so provided by law, such remaining fifty per centum of the expense of elimination of a grade crossing in any other city shall be borne by the state, the county and such city. The proportions of the expense of a grade crossing elimination to be borne by the state and county, state and city, or state, county and city, under the provisions of this section, shall be determined by or pursuant to law. Laws shall be enacted to provide, so far as practicable, for repayment to the state of moneys advanced in aid of railroad companies, counties and cities, at such times, in such manner and with interest at such

rate, that the state shall be able to pay when due the portion of the state debt equal to the proceeds which shall have been so advanced, and interest thereon. The provisions of this article, not inconsistent with this section, relating to the issuance of bonds for a debt or debts of the state and the maturity and payment thereof, shall apply to a state debt or debts created pursuant to this section; except that the law authorizing the contracting of such debt or debts shall take effect without submission to the people pursuant to section four of this article. The aggregate amount of a state debt or debts which may be created pursuant to this section, as hereby amended, shall not exceed the difference between the amount of the debt or debts heretofore created or authorized by law, under the former provisions of this section, and the sum of three hundred million dollars; and the legislature, by law, may authorize or require a county to bear all or part of the portion of the expense of any such crossing elimination, heretofore begun or authorized, which was imposed by former provisions of this section on a city, town or village therein.

Article VIII, Section 10, of Constitution:

§10. No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law. No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate of such county or

city subject to taxation, as it appeared by the assessment rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness; and all indebtedness in excess of such limitation, except such as now may exist, shall be absolutely void except as herein otherwise provided. No county or city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation, shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes; nor to prevent the city of New York from issuing bonds to be redeemed out of the tax levy for the year next succeeding the year of their issue, provided that the amount of such bonds which may be issued in any one year in excess of the limitations herein contained shall not exceed one-tenth of one per centum of the assessed valuation of the real estate of said city subject to taxation. All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not required within five years after their date of issue, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted; except that debts heretofore or hereafter incurred by any city to provide for the supply of water, shall not be so included; and except that debts not exceeding in the aggregate the sum of ten million dollars, heretofore or hereafter incurred by any city with a population of not less than two hundred and fifty thousand and not more than one million, and except that debts not exceeding in the aggregate the sum of five million dollars heretofore or hereafter incurred by any city with a population of not less than one hundred and seventy-five thousand and

not more than two hundred and fifty thousand, for so much of the cost and expense of any public improvement as may be required by the ordinance or other local legislative law therein assessing the same to be raised by assessment upon local property or territory, shall not be so included; and except further that any debt hereafter incurred by the city of New York for a public improvement owned or to be owned by the city, which yields to the city current net revenue, after making any necessary allowance for repairs and maintenance for which the city is liable, in excess of the interest on said debt and of the annual installments necessary for its amortization may be excluded in ascertaining the power of said city to become otherwise indebted, provided that a sinking fund for its amortization shall have been established and maintained and that the indebtedness shall not be so excluded during any period of time when the revenue aforesaid shall not be sufficient to equal the said interest and amortization installments, and except further that any indebtedness heretofore incurred by the city of New York for any rapid transit or dock investment may be so excluded proportionately to the extent to which the current net revenue received by said city therefrom shall meet the interest and amortization installments thereof, provided that any increase in the debt incurring power of the city of New York which shall result from the exclusion of debts heretofore incurred shall be available only for the acquisition or construction of properties to be used for rapid transit or dock purposes. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any debt incurred by the city of New York for a revenue producing improvement to be so excluded shall be determined, and no such debt shall be excluded except in accordance with the determination so prescribed. The legislature may in its discretion confer appropriate jurisdiction on the appellate division of the supreme court in the first judicial department for the purpose of determining the amount of any debt to be so ex

cluded. No indebtedness of a city valid at the time of its inception shall thereafter become invalid by reason of the operation of any of the provisions of this section. Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease, but the debt of the county, heretofore existing, shall not, for the purposes of this section, be reckoned as a part of the city debt. The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand inhabitants, or in any such city of this state, in addition to providing for the principal and interest of the county or city debt, shall not in the aggregate exceed in any one year two per centum of the assessed valuation of the real and personal estate of such county or city, to be ascertained as prescribed in this section in respect to county or city debt.

Section 3 of Chapter 677, Laws of New York, 1928 (known as the "New York City Grade Crossing Elimination Act"), as amended by Chapter 341, Laws of New York, 1930, is as follows:

§3. The cost of all eliminations ordered pursuant to the provisions of this act and any liability for any elimination heretofore designated and ordered by the transit commission pursuant to the provisions of chaper five hundred and ten of the laws of nineteen hundred and twenty-six or such act as amended by chapters four hundred and forty-four and four hundred and forty-six of the laws of nineteen hundred and twenty-seven, shall be borne as follows: forty-nine per centum by the state, one per centum by the city and fifty per centum by the railroad corporation, or, if two or more railroad corporations be affected, such part of such fifty per centum shall be borne by each of said railroad corporations as may be determined by the commission. The cost of all such eliminations shall include ex-

penses incurred by the transit commission in the supervision of the work during the construction period, in the appropriation of property and easement rights, in the settlement of all claims recognized by this chapter and any additional expenses necessarily incurred during the performance of any of the duties required of the transit commission pursuant to this chapter.

Subdivision 1 of Section 14-b of the State Finance Law, as added by Chapter 300, Laws of New York, 1926, is as follows:

§14-b. *Issuance of grade crossing bonds.* 1. Whenever the legislature, under the power granted to it by section fourteen of article seven of the state constitution, shall have authorized the creation of a state debt or debts for the elimination of grade crossings at grade, bonds of the state, to the amount of the debt or debts so authorized, shall be issued and sold by the state comptroller. They shall be known as "grade crossing bonds." They shall bear interest as such rate, not exceeding five per centum per annum, as in the judgment of the state comptroller may be sufficient or necessary to effect a sale of the bonds, and such interest shall be payable semi-annually in the city of New York.

Provisions of Public Service Law, which is Chapter 48 of the Consolidated Laws of New York:

§3. *Department of public service: divisions.* There shall continue to be in the state government a department of public service. The chairman of the public service commission shall be the head of such department and when acting in such capacity shall be known as the chairman of the department of public service. The head of the department shall be the chief executive officer thereof. The appointment or removal of all officers, clerks, inspector

perts and employees of the department or of any division thereof, and all contracts for special service, shall be subject to his approval. The head of the department shall designate one of the commissioners in the department to act as deputy chairman during the absence or disability of the chairman and during such times such deputy chairman shall possess all the powers of the chairman as head of the department. There shall continue to be in the department a division to be known as the state division and a division to be known as the metropolitan division. Each division shall have an official seal.

§4. *State division.* The head of the state division shall continue to be a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner to be designated as chairman in his appointment as such commissioner shall be chairman of the commission until his term as commissioner expires * * *.

§4-b. *Metropolitan division.* The head of the metropolitan division shall continue to be a transit commission for cities containing a population of more than one million inhabitants, according to the last preceding federal census or state enumeration, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission shall consist of three members to be appointed by the governor, by and with the consent of the senate. A commissioner designated by the governor shall, during his term of office, be the chairman of the commission. Each commissioner shall be a resident of a city containing a population of more than one million. The term of office of a member of the commission shall be nine years from the sixteenth day of April of the calendar year in which he shall be appointed. Vacancies

shall be filled by appointment for the unexpired term. The commissioners constituting the transit commission, now existing, shall constitute the transit commission until the expiration of their present terms, and until their successors are appointed and have qualified, and the present chairman of such commission shall continue as chairman until the expiration of his present term as commissioner.

§5-a. *Jurisdiction of transit commission.* The jurisdiction, supervision, powers and duties of the transit commission shall extend under this chapter:

1. To railroads, street railroads and stage or omnibus lines or routes lying exclusively within a city containing a population of over one million inhabitants according to the last preceding federal census or state enumeration; and to the persons or corporations owning, leasing or operating the same.

§6. *Counsel to the commissions.* Each commission shall appoint as counsel to the commission an attorney and counselor-at-law of the state of New York, who shall hold office during the pleasure of the commission. Each counsel to the commission shall, subject to the approval of the commission, have the power to appoint, and at pleasure remove, attorneys and counselors-at-law, to assist him in the performance of his duties, and also to employ and remove stenographers and process-servers.

§12. *Counsel to the commissions: duties.* It shall be the duty of counsel to a commission to represent and appear for the people of the State of New York and the commission in all actions and proceedings involving any question under this chapter, or within the jurisdiction of the commission under the railroad law, or under or in reference to any act or order of the commission and if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute all actions and proceedings directed or authorized by the commission, and to expedite in every way possible final determination of

all such actions and proceedings; to advise the commission and each commissioner when so requested in regard to all matters in connection with the powers and duties of the commission and of the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.

§24. *Action to recover penalties or forfeitures.* An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under the railroad law may be brought in any court of competent jurisdiction in this state in the name of the people of the state of New York, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission, the defendant was actually and in good faith prosecuting a suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order. An action may be maintained by the commission for the whole or any part of the penalties or forfeitures prescribed in this chapter, and judgment may be rendered for the amount demanded in the complaint, or for any less amount, as justice may require.

§57. *Summary proceedings.* Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.